

# Articles

## Equal Protection and the Special Relationship: The Case of Native Hawaiians

Stuart Minor Benjamin<sup>†</sup>

In the 1970s, the Supreme Court rejected several equal protection challenges to government programs that singled out members of Indian tribes,<sup>1</sup> invoking a constitutionally grounded "special relationship"<sup>2</sup> between the

---

<sup>†</sup> B.A., Yale University, 1987; J.D., Yale Law School, 1991. I would like to thank Martin Flaherty, Phil Frickey, Jeff Powell, and Gerald Torres for their helpful comments and suggestions.

1. Like many commentators, I generally prefer to use the term "Native American" rather than "American Indian" or "Indian." Substituting "Native American" for "American Indian" in this Article would create difficulties, however, because the Article analyzes whether Native Hawaiians have the same constitutional status as tribes of American Indians, and "Native American" is frequently used to encompass both groups. A related terminological issue is that the constitutional provision on which the special relationship is grounded, Article I, Section 8, clause 3 gives Congress authority over "Indian Tribes." See U.S. CONST., art. I, § 8, cl. 3; *infra* notes 24–29 and accompanying text. This Article examines whether Native Hawaiians are an "Indian Tribe[]" for constitutional purposes, so substitution of a different term for "Indian Tribes" would not correspond to the crucial constitutional language.

For purposes of clarity and simplicity, this Article will use the term "American Indians" to refer to the descendants of the original residents of what are now the lower 48 states; "Alaska Natives" to refer to those descended from the original residents of what is now the state of Alaska; "Native Hawaiians" to refer to the descendants of the original residents of what is now the State of Hawaii, *see also infra* note 6, and "Native Americans" (or "native groups") to refer to all of these groups combined (that is, the groups originally residing in what are now the 50 states). Also, because this Article considers what is (and is not) an "Indian Tribe[]" within the meaning of the Constitution, U.S. CONST. art. I, § 8, cl. 3, it will, in referring to the constitutional standards, use "Indian" and "Indian Tribes" as terms of art.

2. *Morton v. Mancari*, 417 U.S. 535, 552 (1974), was the first Supreme Court case to utilize the term "special relationship" to refer to the relationship between the federal government and Indian tribes. The Supreme Court (and other courts) have since used the term in a number of cases, and it has become a commonplace phrase. See, e.g., *United States v. Mitchell*, 445 U.S. 535, 546 n.7 (1980); *LaPier v. McCormick*, 986 F.2d 303, 305 (9th Cir. 1993); *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1432 (10th Cir. 1990). Outside the equal protection context, the Court has also referred to a "trust relationship" between the federal government and Indian tribes. See, e.g., *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) ("The canons of [statutory] construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians."); *United States v. Mitchell*, 463 U.S. 206, 226 (1983) ("[T]he existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust."). In fact, "trust relationship" is the more common phrase among commentators. See, e.g., FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 220–28 (Rennard Strickland et al. eds., 1982). Because this Article focuses on the application of current equal protection standards to programs singling out Native Hawaiians, it uses the term that the Court used in

United States and Indian tribes under which tribal classifications were political, not racial, and were subject to mere rational basis review.<sup>3</sup> More recently, the Supreme Court has held that all government programs with racial or ethnic classifications are subject to strict scrutiny.<sup>4</sup> The Court has never squarely addressed the relationship between these two lines of cases, however, or explicitly delineated the boundary between tribal and racial classifications. In particular, the Court has not had occasion to decide whether the rational basis review for programs singling out members of Indian tribes applies to programs that utilize nontribal categorizations of Native Americans.<sup>5</sup> This Article addresses the constitutional status of such programs, using as a case study the programs involving one particular indigenous group—Native Hawaiians.<sup>6</sup>

The issue considered here is a significant one in both constitutional and Native American law, for it sheds light on the breadth of the principles articulated in *Adarand Constructors, Inc. v. Peña*<sup>7</sup> and *City of Richmond v. J.A. Croson Co.*,<sup>8</sup> and therefore on whether, and to what extent, federal and state governments can enact legislation for the benefit of Native

---

*Mancari*, namely, "special relationship." However denominated, the concept, as implemented in *Mancari* and its progeny, is that there is a relationship between the federal government and Indian tribes under which the federal government can single out Indian tribes for different treatment without triggering heightened scrutiny. For more on the constitutional grounding of the special relationship, see *infra* notes 24–29, 35–36 and accompanying text.

3. See *Mancari*, 417 U.S. 535; *United States v. Antelope*, 430 U.S. 641 (1977); see also cases cited *infra* notes 43–44.

4. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

5. References to "singling out" groups and "different" or "special" treatment often carry negative connotations, but no such implication is intended here. This Article uses those terms simply to clarify that the focus is not on programs that apply to all persons with equal force but nonetheless have a disproportionate impact on Native Hawaiians, but rather on those that specify Native Hawaiians as the objects of the legislation and do not apply to the other Hawaiian citizens.

It also bears noting that the singling out of Native Hawaiians takes two different forms. Some of the legislation applies to all Native Americans, see, e.g., Native American Programs Act of 1974, 42 U.S.C. §§ 2991–92d (1994), or to Native Americans and other minority groups, see, e.g., Disadvantaged Minority Health Improvement Act of 1990, Pub. L. No. 101-527, 104 Stat. 2311 (1990) (codified as amended in scattered sections of 42 U.S.C.), and enumerates Native Hawaiians as one of several beneficiary groups. Other legislation, including the most important program, the Hawaiian Homes Commission Act, see *infra* notes 64–65, as well as virtually all of the State of Hawaii's legislation benefiting Native Hawaiians, applies to Native Hawaiians only. This Article does not distinguish between these two categories, as both involve classifications of Native Hawaiians pursuant to which Native Hawaiians are treated differently from the general population of Hawaii.

6. In some statutes, "Native Hawaiian" has a specialized meaning; for instance, the statutes of Hawaii distinguish between a "Native Hawaiian," defined as a "descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778," and a "Hawaiian," defined as any descendant of pre-1778 aboriginal inhabitants, regardless of blood quantum. HAW. REV. STAT. ANN. § 10-2 (Michie 1995); see *infra* notes 64–65, 71–73 and accompanying text. Also, some statutes use other terms, such as "Hawaiian native," to refer to descendants of pre-1778 inhabitants. See 20 U.S.C. § 351a (1994) (giving benefits to "Hawaiian natives"); *id.* § 2313 (same). This Article will use the term "Native Hawaiians" to refer to all classifications based on descent from pre-1778 inhabitants of what is now the State of Hawaii. The significance of 1778 is that it was the year that Westerners—in the form of Captain Cook—"discovered" Hawaii.

7. 115 S. Ct. 2097.

8. 488 U.S. 469.

Americans—including American Indians who are not members of Indian tribes,<sup>9</sup> Alaska Natives who are not part of entities that constitute tribes,<sup>10</sup> and possibly native groups who live in United States territories.<sup>11</sup> The answer to this question will have important ramifications, because there are many statutes that single out members of native groups, defined racially. This Article concentrates on programs that benefit Native Hawaiians, as the stakes are particularly high for them: Whereas much legislation benefiting American Indians is tied to membership in a tribe, all legislation for Native Hawaiians define “Native Hawaiian” by ancestry, as “any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778,”<sup>12</sup> or, in those programs without a blood quantum requirement, simply as the descendants of pre-1778 inhabitants.<sup>13</sup> Thus, if such a definition constitutes a racial classification under the Supreme Court’s case law, all legislation treating Native Hawaiians specially is presumptively invalid.<sup>14</sup>

An examination of statutes for Native Hawaiians is particularly timely in light of the recent vote among Native Hawaiians regarding whether “the [Native] Hawaiian people [shall] elect delegates to propose a Native Hawaiian government.”<sup>15</sup> This Article casts light on the political significance of the decision to create such a government, as it concludes that, without a Native Hawaiian political entity that can constitute an “Indian Tribe[]” for

9. See, e.g., 25 U.S.C. § 297 (1994); *id.* § 482.

10. Some statutes utilize racial definitions in giving benefits to Alaska Natives, and thus would likely stand on no firmer constitutional footing than the statutes singling out Native Hawaiians that are the focus of this Article. See, e.g., 25 U.S.C. § 500n. In addition, the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. §§ 1601–24 (1994), provided the impetus for the creation of Alaska Native Regional Corporations and Alaska Native Village Corporations, and these corporations now receive some government benefits provided to tribes. See *infra* notes 266–71 and accompanying text. The Supreme Court has never had occasion to address the constitutionality of benefits given to such corporations.

11. The applicability of this analysis to native groups in territories is complicated by the separate, and controversial, question of the extent to which the equal protection component of the Fifth and Fourteenth Amendments applies to particular territories. See generally *Waboll v. Villacrusic*, 958 F.2d 1450, 1461 (9th Cir. 1992); Marybeth Herald, *Does the Constitution Follow the Flag into United States Territories or Can It Be Separately Purchased and Sold?*, 22 HASTINGS CONST. L.Q. 707 (1995); Robert A. Katz, *The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories*, 59 U. CHI. L. REV. 779 (1992); Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445 (1992); Stephen J. DiGianfilippo, Note, *The Reach of the Constitution Beyond the Territory and “People” of the United States*, 16 SUFFOLK TRANSNAT’L L. REV. 117 (1992).

12. This is the definition from the first (and most important) federal statute benefiting Native Hawaiians. See Hawaiian Homes Commission Act of 1920, Pub. L. No. 34, § 201(a)(7), 42 Stat. 108 (1921) (codified as amended at HAW. CONST. art. XII, § 1) [hereinafter HHCA], *infra* notes 64–65 and accompanying text. For other statutes utilizing this definition, see *infra* note 96.

13. This definition is utilized in, inter alia, the legislation creating the Office of Hawaiian Affairs (OHA), which is the main state program that benefits Native Hawaiians. See HAW. REV. STAT. ANN. § 10-2 (Michie 1995). For other statutes utilizing this definition, see *infra* note 97.

14. See *Shaw v. Reno*, 509 U.S. 630, 643–44 (1993) (“‘A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.’”) (quoting *Personnel Adm’r v. Feeney*, 442 U.S. 256, 272 (1979)).

15. *Rice v. Cayetano*, Nos. Civ.96-00390 DAE, Civ.96-00616 DAE, 1996 WL 562072, at \*2 (D. Haw. Sept. 6, 1996); see also *infra* notes 251–53 and accompanying text. Although only 40% of the ballots were returned, 73% of those who returned ballots voted in favor of the proposition. See *infra* text accompanying notes 254, 261.

constitutional purposes, there is no "special relationship" between Native Hawaiians and the federal government pursuant to which programs singling out Native Hawaiians would be subject to rational basis review.<sup>16</sup>

Interestingly, despite the fact that dozens of statutes treat Native Hawaiians specially (including one that sets aside approximately 200,000 acres of land for dollar-per-year leases to those with fifty percent or more Native Hawaiian blood),<sup>17</sup> the Supreme Court has never addressed the constitutionality of programs for Native Hawaiians. In fact, there have been only two challenges in the federal courts to programs singling out Native Hawaiians (the second involving the aforementioned Native Hawaiian vote), and in each case the district court addressed the question fairly briefly, concluding that preferences for Native Hawaiians were subject to rational basis review.<sup>18</sup> Similarly, commentators have uniformly contended that programs for Native Hawaiians have the same constitutional status as those for Indian tribes. These commentators, however, generally have not developed the argument at length.<sup>19</sup> This Article examines anew the constitutional status of programs for Native Hawaiians, considering the arguments that could be raised in support of rational basis review and the implications of applying heightened scrutiny.<sup>20</sup>

16. It bears mentioning that the normative implications of such a result for Native Hawaiians are far from clear. The Supreme Court has upheld, pursuant to the federal government's special relationship with Indian tribes, laws that harmed as well as helped Indians. *See infra* notes 30, 40–44 and accompanying text. While the creation of a Native Hawaiian government may enhance Native Hawaiians' collective ability to act, a resulting special relationship would not necessarily benefit Native Hawaiians or enhance their rights; the rights that the special relationship enhances are the federal government's, for good or ill. *See infra* note 42, text accompanying note 201. The desirability of such a relationship, then, turns in part on the speculative question of the federal government's future actions and their impact on Native Hawaiians.

17. *See* HHCA § 203; *see infra* notes 64–97 and accompanying text.

18. *See Rice*, 1996 WL 562072; *Nalielua v. Hawaii*, 795 F. Supp. 1009 (D. Haw. 1990), *aff'd on other grounds*, No. 90-15842, 1991 WL 148771 (9th Cir. 1991). In *Nalielua*, the district judge concluded that the special relationship applies to Native Hawaiians because "Native Hawaiians are people indigenous to the State of Hawaii, just as American Indians are indigenous to the mainland United States." *Id.* at 1013. On appeal, the Ninth Circuit, in an unpublished opinion, ruled that the plaintiff lacked standing to raise this equal protection argument. *See Nalielua*, 1991 WL 148771, at \*1–2; *see also infra* notes 104–06 and accompanying text. In *Rice*, the same district judge denied a motion for a preliminary injunction to stop the release of the results of the Native Hawaiian vote; he relied in part on his opinion in *Nalielua* and in part on the unique aspects of the Native Hawaiian vote in assisting the creation of a native Hawaiian government. The Ninth Circuit has not considered the merits of this challenge.

19. *See, e.g.*, Lisa Cami Oshiro, *Recognizing Na Kanaka Maoli's Right to Self-Determination*, 25 N.M. L. REV. 65, 75–76 (1995); Haunani-Kay Trask, *Coalition-Building Between Natives and Non-Natives*, 43 STAN. L. REV. 1197, 1206 (1991); Mililani B. Trask, *Historical and Contemporary Hawaiian Self-Determination: A Native Hawaiian Perspective*, ARIZ. J. INT'L & COMP. L., Fall 1991, at 77, 82–83; Jon Van Dyke, *The Constitutionality of the Office of Hawaiian Affairs*, 7 U. HAW. L. REV. 63, 66–68, 73–80 (1985); Michael M. McPherson, Comment, *Trustees of Hawaiian Affairs v. Yamasaki and the Native Hawaiian Claim: Too Much of Nothing*, 21 ENVTL. L. 453, 479–80 (1991).

There is one article that considers the constitutional status of Native Hawaiians in some detail, Richard H. Houghton III, *An Argument for Indian Status for Native Hawaiians—The Discovery of a Lost Tribe*, 14 AM. INDIAN L. REV. 1 (1989), but its analysis is flawed. *See infra* note 156. Of the other commentators who have discussed legal issues involving Native Hawaiians, only Professor Van Dyke gives the question of the constitutional status of programs for Native Hawaiians anything more than cursory consideration, and his analysis, too, is flawed. *See infra* notes 146–51 and accompanying text.

20. Some litigants have suggested that there is a "trust relationship" between Native Hawaiians and the federal government. *See Han v. Department of Justice*, 824 F. Supp. 1480, 1486 (D. Haw. 1993), *aff'd*,

The larger issue, though, is how the current case law treats statutes that benefit native groups and that are not tied to membership in a tribal organization. Analyzing this question brings to light the difficulties and peculiarities arising out of the uneasy relationship between the Court's construction of the authority granted by the Indian Commerce Clause and of the limitations entailed in the equal protection component of the Fifth and Fourteenth Amendments; between the federal government's special relationship with Indian tribes recognized in *Morton v. Mancari*<sup>21</sup> and the hostility to racial classifications in *Adarand* and *Croson*; and, ultimately, between the historical tradition of treating native groups differently and the idea that racial classifications are repugnant and therefore are presumed to violate equal protection norms.

This Article's focus on current doctrine as reflected in the case law differs from that of most commentators on Native American law. Those commentators usually write normatively about how the courts should be construing Native American law, and they often criticize the existing case law (in particular the Supreme Court's cases) as poorly reasoned and inconsistent.<sup>22</sup> That the Court's reasoning may lack a sound theoretical foundation or fail to support

---

45 F.3d 333, 337 (9th Cir. 1995). The *Han* litigants appear to have regarded the trust relationship as synonymous with what I am calling the special relationship—the relationship identified in *Mancari* and grounded in the Indian Commerce Clause under which the federal government can single out certain groups for different treatment without triggering strict scrutiny. See also *supra* note 2; *infra* note 28. Insofar as they are asserting that this constitutionally grounded relationship exists, this Article responds to that assertion.

Others, however, have articulated the trust relationship as arising out of certain statutes, without addressing (perhaps because they assumed it was not an issue or not relevant) the constitutional grounding for it. See Mark A. Inciong, *The Lost Trust: Native Hawaiian Beneficiaries Under the Hawaiian Homes Commission Act*, ARIZ. J. INT'L & COMP. L., Fall 1991, at 171; Charles F. Wilkinson, *Land Tenure in the Pacific: The Context for Native Hawaiian Land Rights*, 64 WASH. L. REV. 227 (1989). That is, they have contended that Congress, through the Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959) [hereinafter Admission Act], the HHCA, and the Annexation Act of 1898, Act of July 7, 1898, 30 Stat. 750, has entered into a trust relationship with Native Hawaiians, and they have not focused on the underlying question of Congress's constitutional authority to enter into such a relationship. The question addressed in this Article—whether there is a constitutional grounding for treating Native Hawaiians specially such that this treatment will not be subject to strict scrutiny—is antecedent to the question whether the language of certain statutes provides for such special treatment. Congress's acknowledgement of a trust relationship would still leave open the question whether Congress did so pursuant to the special relationship with Indian tribes (in which case rational basis review would apply) or whether Congress legislated outside the scope of the special relationship (in which case strict scrutiny would apply, as it does to other racial or ethnic classifications in legislation). See also *infra* text accompanying notes 32–44. It may be, then, that Congress did obligate itself to provide certain services to Native Hawaiians, but that in so doing it exceeded its constitutional authority. Conversely, it is possible that Congress did not enter into a trust relationship with Native Hawaiians, but nonetheless the special (or trust) relationship extends to them. After all, constitutional authority may exist irrespective of whether Congress has ever acted on that authority to enter into a particular relationship.

21. 417 U.S. 535 (1974).

22. See, e.g., Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203 (1989); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137 (1990); Sharon O'Brien, *Tribes and Indians: With Whom Does the United States Maintain a Relationship?*, 66 NOTRE DAME L. REV. 1461 (1991).

its conclusions does not, however, render its cases indeterminate or unworthy of analysis. For better or worse, the cases addressed in this Article have, in my view, clearly drawn a distinction between tribal and ethnic classifications, and have given rise to discernible doctrines. The possible tensions in the Court's cases do not condemn the enterprise of understanding the doctrines those cases create; on the contrary, identifying and evaluating such tensions is a powerful reason to understand the Court's doctrines. A judgment on the distinctions the Supreme Court has drawn must rest on an understanding of the current state of the case law. The purpose of this Article, therefore, is to explore the case law on statutes singling out Native Americans, and in particular *Adarand* and *Mancari*, not in an attempt to justify the cases, but rather in an attempt to bring to light the interplay between them, and the difficulties that such interplay produces.

The first Part of the Article sets out the legal standards for legislation treating Indian tribes specially. The second Part addresses the history of Native Hawaiians and the enactment of laws singling them out for different treatment. The third Part posits arguments that could be made in favor of application of rational basis review to legislation for Native Hawaiians, ultimately concluding that current statutes would be subject to strict scrutiny. The fourth Part briefly discusses the potential impact of this conclusion on programs singling out Native Hawaiians. The fifth Part addresses ways of bringing Native Hawaiians within the special relationship. The sixth and concluding Part notes the ramifications of the analysis contained in this Article for native groups more generally.

## I. CONSTITUTIONAL STANDARDS FOR LEGISLATION THAT SINGLES OUT INDIAN TRIBES

Before 1974, the Supreme Court considered a number of challenges to government actions with respect to Indians, but none involved an equal protection challenge to the singling out of Indian tribes (or Native Americans more generally) for different treatment; instead, the litigants usually contended that a particular action exceeded the scope of Congress's power over Indians. The Court consistently rejected these challenges, finding that Congress had broad—often called “plenary”—power over Indians.<sup>23</sup> Over the years, the

---

23. One commentator has argued that the Framers rejected a clause proposed by James Madison that would have granted Congress plenary authority “[t]o regulate affairs with the Indians” and instead chose the language of the Indian Commerce Clause in order to give Congress narrower powers. See Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 AM. INDIAN L. REV. 57, 73 (1991) (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 325 (M. Farrand ed., rev. ed. 1937) (Aug. 18, 1787) (motion of James Madison, Virginia)). On this basis, he argues that the Court should not have interpreted the Clause so broadly. See *id.* at 72–87; see also Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 999–1001, 1011–12 (1981) (discussing need for additional limits on congressional power in light of plenary

Court has articulated different sources for this authority. Chief Justice Marshall grounded it in both history and the Indian Commerce Clause of the Constitution, which gives Congress the power "[t]o regulate Commerce . . . with the Indian Tribes."<sup>24</sup> Later, in *United States v. Kagama*,<sup>25</sup> the Court rejected reliance on the Indian Commerce Clause<sup>26</sup> and instead concluded that the federal government's power "must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."<sup>27</sup> More recently, the Court has moved away from *Kagama*'s suggestion of extraconstitutional powers and has instead grounded Congress's power over Indians—and the concomitant special relationship between the federal government and Indian tribes—in the Indian Commerce Clause and, at least to some extent, the Treaty Clause of Article II.<sup>28</sup> Under both the former extraconstitutional approach and

---

interpretation of Indian Commerce Clause); *infra* note 28. This Article addresses the constitutional status of legislation giving benefits to Native Hawaiians under current case law and so will not consider arguments that reject the prevailing jurisprudence.

24. U.S. CONST. art. I, § 8, cl. 3; see *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831); see also Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 390–92 (1993).

25. 118 U.S. 375 (1886).

26. See *id.* at 378–79.

27. *Id.* at 384–85. As Professor Philip Frickey has pointed out, this reasoning, based on the inherent power of the federal government, bears a strong resemblance to the reasoning in the *Chinese Exclusion Case*, 130 U.S. 581 (1889), involving federal power over immigration, and in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), involving federal power (in that case, specifically the President's power) over foreign affairs. See Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 60–66 (1996).

28. See *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973) ("The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making."); *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974) (locating source of power over Indian tribes in Indian Commerce Clause and Treaty Clause); *United States v. Antelope*, 430 U.S. 641, 645 & n.6 (1977) (citing Indian Commerce Clause as providing for federal classification of Indian tribes); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs"), see also Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 230–31 (1984) (noting that "the Court has looked increasingly to enumerated powers" and has "repudiated the notion that Congress's plenary power was extraconstitutional"), Alex Tallchief Skibine, *Braid of Feathers: Pluralism, Legitimacy, Sovereignty, and the Importance of Tribal Court Jurisprudence*, 96 COLUM. L. REV. 557, 568 (1996) (reviewing FRANK POMMERSHEIM, *BRAID OF FEATHERS* (1995)), Mike Townsend, *Congressional Abrogation of Indian Treaties: Reevaluation and Reform*, 98 YALE L.J. 793, 808 (1989).

Congress's plenary power and the basis of a special (or trust) relationship are significant issues that many commentators have addressed at great length. In doing so, they have frequently taken issue with the Court's articulation of the special relationship and have suggested different ways of conceptualizing the relationship between the federal government and Indians. An example of one such alternative view is the suggestion that other provisions of the Constitution, such as the Fourteenth Amendment, provide the grounding for the special relationship. See *infra* note 115. Another theory is that there is no plenary power over Indians, so that the Court's claimed constitutional grounding for the special relationship does not exist. See, e.g., Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, Savage, *supra* note 23; Clinton, *supra* note 23; Skibine, *supra*, at 568–69. Yet another is that plenary power and the trust (or special) relationship are quite different—that the former describes Congress's powers (which should be limited), and the second describes an extraconstitutional relationship that not only transcends the Indian

the current one based on the Indian Commerce Clause, the Court invariably found Congress's power to be quite broad<sup>29</sup>—encompassing measures that harmed as well as helped Indians.<sup>30</sup>

The only successful challenges to Congress's power to enact a particular law have argued not that the Indian Commerce Clause was insufficient, but rather that an independent constitutional limitation—most recently, the penumbral emanations from the Eleventh Amendment—constrains Congress's exercise of its authority.<sup>31</sup> One set of such cases (albeit one that has never met with success in the Supreme Court) involved the contention that a given federal government action violated the equal protection component of the Due Process Clause of the Fifth Amendment. The central case, decided in 1974, is *Morton v. Mancari*,<sup>32</sup> the first in which the Supreme Court confronted an equal protection challenge to a law benefiting Native Americans. In *Mancari*, non-Indian employees of the Bureau of Indian Affairs (BIA) argued that a BIA employment preference for Indians (authorized by a statute allowing Indian preferences) violated the equal protection component of the Due Process

---

Commerce Clause (and the rest of the Constitution) but also entails a trust responsibility that Congress has toward Indians. See, e.g., Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1495–505; Sharon L. O'Brien, *Freedom of Religion in Indian Country*, 56 MONT. L. REV. 451, 475–83 (1995). Such arguments perform the important function of addressing how the Supreme Court should construe the federal government's authority vis-à-vis Indians, but this Article is concerned with the implications of the Supreme Court's current jurisprudence; and, as the cases cited above indicate, the Court appears to treat the special relationship as arising out of the broad powers conferred on Congress by the Indian Commerce Clause and perhaps the Treaty Clause.

29. *United States v. Lopez*, 115 S. Ct. 1624 (1995), might portend some limit on Congress's powers under the Indian Commerce Clause. In invalidating the Gun-Free School Zones Act, the Court, for the first time in half a century, struck down an enactment as beyond Congress's interstate commerce power. It is possible that the Court will also apply some limits to the Indian Commerce Clause. Cf. *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1126–27 (1996) (rejecting argument that Indian and Interstate Commerce Clauses entailed different balances of power between federal and state governments). Thus *Lopez* could be the catalyst for a change that some Native American law scholars have been championing for years—namely, a limitation on Congress's plenary power over Indian tribes. See, e.g., Ball, *supra* note 28, at 61–66.

30. See, e.g., *Antelope*, 430 U.S. 641 (upholding convictions of tribal members under more rigorous federal, rather than state, criminal laws that applied to them because they were Indians and rejecting argument that *Mancari* applied only to programs that helped Indians); *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979) (allowing imposition of "checkerboard" jurisdiction over Indian reservations despite tribes' objection that it harmed them); see also *Duro v. Reina*, 495 U.S. 676, 692 (1990) (noting "the Federal Government's broad authority to legislate with respect to enrolled Indians as a class, whether to impose burdens or benefits"). For more on this point and its implications, see *infra* notes 244–47 and accompanying text.

31. See *Seminole Tribe*, 116 S. Ct. at 1133. In *Seminole Tribe*, the Court focused on the Indian Commerce Clause as the grounding for Congress's power over Indians even as it found that all of Congress's Article I powers were limited not by the "straw man" of constitutional text, but instead by a "background principle" embodied in the Eleventh Amendment. See *id.* at 1130–31; see also *Hodel v. Irving*, 481 U.S. 704, 713–14 (1987) (citing Takings Clause as limiting force on Congress's power); *Choate v. Trapp*, 224 U.S. 665 (1912) (holding Fifth Amendment restricts Congress's Indian Commerce Clause power in matters of Indian taxation); *Muskrat v. United States*, 219 U.S. 346 (1911) (dismissing case as outside power of Congress to confer jurisdiction); *Jones v. Meehan*, 175 U.S. 1 (1899) (holding construction of treaties to be outside congressional power).

32. 417 U.S. 535 (1974).



Clause of the Fifth Amendment.<sup>33</sup> The Court's discussion of the equal protection challenge was fairly brief.<sup>34</sup> The Court began its analysis by noting the "unique legal status of Indian tribes under federal law" and the "plenary power of Congress . . . to legislate on behalf of federally recognized Indian tribes."<sup>35</sup> The Court stated that this plenary power

is drawn both explicitly and implicitly from the Constitution itself. Article I, § 8, cl. 3, provides Congress with the power to "regulate Commerce . . . with the Indian Tribes," and thus, to this extent, singles Indians out as a proper subject for separate legislation. Article II, § 2, cl. 2, gives the President the power, by and with the advice and consent of the Senate, to make treaties. This has often been the source of the Government's power to deal with the Indian tribes.<sup>36</sup>

The opinion then suggested that both Congress and the Court had recognized the "special relationship" between the federal government and Indian tribes.<sup>37</sup>

After laying this groundwork, the Court turned to the program at issue. The Court's analysis revolved around a crucial conclusion—that the BIA preference did not constitute racial discrimination, and in fact was not even a racial preference: "The preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes" and thus "the preference is political rather than racial in nature."<sup>38</sup> The Court then amplified this point, stating that

---

33. Although *Mancari* used the term "due process" rather than "equal protection," the language in *Mancari* (and in later cases) indicates that the Court treats the difference as semantic. In *Mancari*, the Court characterized the challenge as "whether . . . the preference constitutes invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954)" *Mancari*, 417 U.S. at 551. The Court's citation to *Bolling* is significant, because that case involved a challenge under the equal protection component of the Due Process Clause of the Fifth Amendment. It appears, therefore, that *Mancari* refers only to the Due Process Clause because that is the clause at issue in equal protection cases against the federal government. See *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73 (1977) (citing *Mancari* as delineating proper standard in equal protection cases, and frequently referring to plaintiffs' claim under equal protection component of Due Process Clause of Fifth Amendment simply as due process claim); *Yakima Nation*, 439 U.S. at 500-01 (citing *Mancari* as applicable equal protection precedent); *Antelope*, 430 U.S. at 645-47 (treating *Mancari* as equal protection case).

34. The non-Indian employees also argued that the hiring preference was prohibited by the Equal Employment Act of 1972; the Court devoted most of the opinion to rejecting this challenge.

35. *Mancari*, 417 U.S. at 551.

36. *Id.* at 551-52. The suggestion, made here and in other Supreme Court cases, that the special relationship is grounded in the Indian Commerce Clause (and perhaps the Treaty Clause) has provoked commentators to offer possible alternatives. See *supra* note 28. The contrast between the Court's modern focus on constitutional grounding and the view it articulated in *United States v. Kagama*, 118 U.S. 375 (1886), is particularly striking. See Steven Paul McSloy, *Back to the Future: Native American Sovereignty in the 21st Century*, 20 N.Y.U. REV. L. & SOC. CHANGE 217, 275 (1993) ("In *Mancari*, the power justified in *Kagama* on the basis of wardship is said to be instead based upon provisions of the Constitution, even though *Kagama* had explicitly rejected such a constitutional basis.").

37. See *Mancari*, 417 U.S. at 552.

38. *Id.* at 553 n.24. One of the most important aspects of the Court's conclusion was left unstated: The Court ignored the statutory definition of "Indian" and instead looked only to the BIA regulation's definition. This was crucial, because the statute—the Indian Reorganization Act of 1934, 48 Stat. 984 [hereinafter IRA]—provided for benefits to "Indians," defined as members of federally recognized Indian tribes and

[t]he preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. See n.24. In the sense that there is no other group of people favored in this manner, the legal status of the BIA is truly *sui generis*.<sup>39</sup>

The Court ruled that, in light of this distinction, the preference for tribal members was not suspect and therefore was subject to review under a rational basis test, rather than under heightened scrutiny.<sup>40</sup>

---

"all other persons of one-half or more Indian blood." 25 U.S.C. § 479 (1994); 48 Stat. 988. The Court did not mention this definition, however, and instead focused entirely on the regulation implementing the statute; the regulation did limit the beneficiaries to tribal members. See *Mancari*, 417 U.S. at 553 n.24 (quoting BIA Manual, which limited preference to those who were "one-fourth or more degree Indian blood and . . . a member of a Federally-recognized tribe"). Thus, without saying so, the Court treated as binding the regulatory implementation of the IRA, perhaps applying (without so stating) the principle of statutory construction that a court should construe a statute so as to avoid constitutional problems.

39. *Mancari*, 417 U.S. at 554. The footnote to which the Court referred (note 24) is quoted immediately above.

40. The test enunciated in *Mancari* differed slightly from the ordinary formulation of the rational basis test, as it looked to whether "the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Id.* at 555 (emphasis added). The highlighted language arguably indicates that the *Mancari* test differed from the rational basis test used with other classifications that are not suspect (i.e., whether a law is rationally related to a legitimate government interest). See Newton, *supra* note 28, at 273 ("[A]lthough the Court used the phrase 'tied rationally,' the analysis in the opinion suggests that the Court actually applied more than minimal rationality scrutiny . . ."); Ralph W. Johnson & E. Susan Crystal, *Indians and Equal Protection*, 54 WASH. L. REV. 587, 599 (1979) ("[T]he approach that the Court in fact undertook in *Mancari* suggests something more than minimum rationality.").

The Court's post-*Mancari* opinions, however, have abandoned any suggestion that the level of scrutiny for equal protection challenges to tribal classifications is more rigorous than that for other nonsuspect classifications. See, e.g., *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (1979) (referring to applicable test as involving "conventional Equal Protection Clause criteria," under which "legislative classifications are valid unless they bear no rational relationship to the State's objectives"); see also *id.* at 500 (stating that challenged Washington law "must be sustained against an Equal Protection Clause attack if the classifications it employs 'rationally furthe[r] the purpose identified by the State'") (quoting *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976)). The Court in *Yakima Nation* did not attempt to justify the relevant federal statute under Congress's unique obligation to the Indians (which, it should be noted, might have been difficult in that case); in fact, it did not intimate that such an inquiry was necessary or even relevant. The Court simply suggested that ordinary rational basis review applied, a point driven home by the citation to *Murgia*, which did not involve Native Americans and was an ordinary equal protection case. See *Murgia*, 427 U.S. at 314.

Similarly, though statements in *Mancari* suggested that any preference must be related to "Indian self-government," 417 U.S. at 554, 555, later cases have not required such a nexus. For instance, in *United States v. Antelope*, 430 U.S. 641, 646 (1977), the Court rejected an equal protection challenge to a federal statute providing harsher criminal treatment of tribal members than would have been the case if they had not been American Indians. The Court squarely noted that this differential treatment was unrelated to tribal self-government but indicated that this was of no importance:

Both *Mancari* and *Fisher* [v. *District Court*, 424 U.S. 382 (1976),] involved preferences or disabilities directly promoting Indian interests in self-government, whereas in the present case we are dealing not with matters of tribal regulation, but with federal regulation of criminal conduct with Indian country implicating Indian interests. But the principles reaffirmed in *Mancari* and *Fisher* point more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications.

*Id.*; see also Newton, *supra* note 28, at 280 ("After *Antelope* . . . it is difficult to conceive of a federal statute regarding Indian tribes, not motivated by racial discrimination, that could be found to violate the requirements of equal protection.").

The distinction between tribal and racial distinctions thus served as the linchpin of the entire decision.<sup>41</sup> As long as the Court could characterize the benefits to Indian tribes as existing on a government-to-government basis, it could distinguish such a scheme from suspect classifications that are subject to strict scrutiny.<sup>42</sup>

---

41. In light of the great emphasis that *Mancari* placed on the tribe/race distinction, it is worth noting that both terms may be more fluid than the Court might have believed. As to tribes, the federal government often played a significant role in shaping their structure. Precontact Indians were organized in many different kinds of arrangements, some of which were subtribal (such as family clans). The presence of the federal government and the need for an organized response to the federal government frequently led to the disintegration of subtribal groupings and the prevalence of tribal organization. See STEPHEN CORNELL, *THE RETURN OF THE NATIVE* 76-86 (1988). Moreover, the government on a number of occasions combined several tribes into one or split a single tribe into several. See FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 268 (1942). Even today, the government can exert an enormous influence over tribes in determining which it will recognize (and, as importantly, which it will terminate). Although these decisions do not necessarily alter tribes (because all that is terminated is the relationship with the government, see *infra* note 202), as a practical matter such decisions can have a significant impact on the stability of a tribe.

Meanwhile, many commentators have suggested that race is socially constructed, leading them to conclude that racial classifications are fairly malleable. See, e.g., Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231 (1994); Ian F. Haney-López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994).

42. Although the Court did not directly address the question of the operation of the equal protection component of the Fifth Amendment upon the Indian Commerce Clause (and upon the Treaty Clause, insofar as that clause formed the basis of the Court's decision), its reasoning in *Mancari* (and the other Supreme Court cases discussing the special relationship) apparently relies on the notion that the equal protection components of the Fifth and Fourteenth Amendments apply with limited force to legislation enacted pursuant to the Indian Commerce Clause. Professor David Williams has criticized this aspect of *Mancari*, contending that the Equal Protection Clause of the Fourteenth Amendment should be understood as effectively negating Congress's power to single out Indian tribes under the Indian Commerce Clause. See David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 782-86 (1991). Any such evisceration of the Indian Commerce power would be *sub silentio* in the truest sense of the term. Both the text and the legislative history of the Equal Protection Clause are silent as to its impact on the Indian Commerce Clause. This is not surprising, of course. The Fourteenth Amendment addresses state action, and its framers almost certainly gave no thought to the impact of the Equal Protection Clause on the Indian Commerce Clause (which empowered Congress), particularly because, then as now, relations with Indian tribes were generally treated as the province of the national government. It would have required a mighty far-sighted senator or congressman to anticipate the judicial discovery of the equal protection component of the Fifth Amendment and then to contemplate its possible impact on the Indian Commerce Clause.

Relatedly, it is interesting to note that commentators have frequently grounded arguments for expanded rights of racial and ethnic minorities in a broad reading of the equal protection components of the Fifth and Fourteenth Amendments. Here, however, in light of the Supreme Court's construction of equal protection in *Adarand* and *Croson*, a narrower view of the impact of the equal protection components of the Fifth and Fourteenth Amendments on the rest of the Constitution would work to preserve programs singling out Indian tribes. This is a function, of course, of the fact that the Supreme Court has found an independent constitutional basis for programs designed for Indian tribes; African Americans may have nowhere to turn in the Constitution other than the Fourteenth Amendment, but Indians have the Indian Commerce Clause. More fundamentally, though, the notion that the Court's narrower interpretation of the Fourteenth Amendment in the Indian tribal context enhances the rights of Indians is faulty. The Court's construction of the Indian Commerce Clause as informing (if not overwhelming) equal protection considerations means that the government has more power: It can enact legislation singling out members of Indian tribes that it cannot enact with respect to other racial or ethnic groups. This legislation may, by and large, benefit Indians, and it may even empower them in some situations, but that is mere coincidence, the group that is empowered (i.e., is given greater latitude and authority) is Congress, not Indian tribes. See *also infra* text accompanying note 201. The Court has driven this point home in ruling that Congress's broad powers over Indian tribes render classifications that harm Indians, as well as those that benefit them, subject to rational basis review; the constitutional touchstone, according to the Court, is Congress's power,

After *Mancari*, there were several Supreme Court cases that raised equal protection challenges to government actions that singled out members of Indian tribes.<sup>43</sup> In all of these cases, the Court applied *Mancari*'s analysis without attempting to modify its tribe/race dichotomy and upheld the constitutionality of the provision; in fact, the Court often dealt with the relevant equal protection claim simply by quoting *Mancari* and noting that the preference at issue was for members of Indian tribes, rather than Indians generally, so that it was a political and not a racial classification.<sup>44</sup>

## II. THE HISTORY OF HAWAIIAN GOVERNANCE AND THE ENACTMENT OF STATUTES BENEFITING NATIVE HAWAIIANS

Though a full history of Native Hawaiians would be supererogatory and cumbersome, the governance of Hawaii and the development of federal and state laws singling out Native Hawaiians merit consideration. The history of governance provides important background on Native Hawaiians' similarities (and dissimilarities) to Indian tribes, and, more generally, on the impact of non-Polynesians on Native Hawaiians; the focus on statutes enacted for Native Hawaiians introduces not only the statutory framework but also some of the complications arising from the interplay between statutes that require fifty

---

not Indian tribes' empowerment. See *Antelope*, 430 U.S. at 645–50; *Yakima Nation*, 439 U.S. at 499–502. For more on the downside of the special relationship, see *infra* notes 244–47 and accompanying text.

43. See, e.g., *Yakima Nation*, 439 U.S. at 463; *Antelope*, 430 U.S. at 641; *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Fisher v. District Court*, 424 U.S. 382 (1976).

There have also been equal protection challenges in the Supreme Court to government programs benefiting several minority groups, including Native Americans (defined by race, not tribal membership); all of the major challenges to affirmative action programs have involved laws that benefited, *inter alia*, Native Americans. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2102 (1995); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 553 n.1 (1990); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478 (1989); *Fullilove v. Klutznick*, 448 U.S. 448, 454 (1980). In none of these cases did the challenged application involve a preference for a Native American; on the other hand, in none of them did the Supreme Court give any reason to conclude that a different level of scrutiny would apply to preferences for Native Americans. See *infra* notes 136–42 and accompanying text.

44. See *Confederated Salish & Kootenai Tribes*, 425 U.S. at 479–80 ("We need not dwell at length on this [equal protection] argument [challenging special treatment for Indian tribes], for . . . we think it is foreclosed by our recent decision in *Morton v. Mancari* . . ."); see also *Yakima Nation*, 439 U.S. at 500–01; *Antelope*, 430 U.S. at 646–47; *Fisher*, 424 U.S. at 390–91; *cf. infra* notes 122–31 and accompanying text. *Yakima Nation*, decided in 1979, was the last Supreme Court case to address squarely an equal protection challenge to a law singling out tribal Indians. The Court has, in fact, rarely cited *Mancari* since then; the only case that has placed any weight on *Mancari* since 1980 is *Duro v. Reina*, 495 U.S. 676 (1990), in which the Court cited *Mancari* and *Antelope* in support of "the Federal Government's broad authority to legislate with respect to enrolled Indians as a class, whether to impose burdens or benefits." *Id.* at 692.

It is possible, especially in light of *Croson*, *Metro Broadcasting*, and *Adarand* (all of which were decided after *Yakima Nation*) that, if the issue arises again, the Court will conclude that even political classifications based on tribal membership are subject to strict scrutiny. It is also possible—though much less likely—that the Court would abandon the tribe/race dichotomy in favor of minimal scrutiny for all legislation benefiting people who are racially classified as Native Americans. Such possible changes in the Supreme Court's jurisprudence are beyond the scope of this Article.

percent native blood and those that merely require descentance from pre-1778 inhabitants.

The first settlers of the Hawaiian Islands were Polynesians who arrived more than one thousand years ago. A second wave of migrants (also Polynesians) arrived later, perhaps six to eight hundred years ago, and became the dominant group (for instance, the chiefs were drawn from their ranks). The Hawaiians then lived in relative isolation until the arrival of the British Captain James Cook in 1778.<sup>45</sup> The political and economic system that developed before 1778 bears some resemblance to the feudal system of medieval Europe: The land was divided into large units called *ahupua'a*, each of which was controlled by a chief; land agents and subchiefs subordinate to the chief controlled subunits of *ahupua'a*; and, at the bottom, common farmers worked plots for the chief (though they also worked plots for their own use). All landholdings were considered revocable, and there was no concept similar to fee simple absolute.<sup>46</sup>

In 1810 King Kamehameha, with the aid of Westerners and Western arms, unified the islands (which had been controlled by separate—and frequently warring—kings) into a monarchical government under his control.<sup>47</sup> Western nations, including the United States, treated the monarchy as a foreign sovereign through most of the nineteenth century.<sup>48</sup> At the same time, Westerners arrived on the islands and began to influence life there. The King and his court began to adopt Western ways, abandoning, for instance, the traditional religion.<sup>49</sup> The landholding system was also transformed, as the feudal system began to disintegrate and some Westerners sought (and received) from the King land on which they built plantations. The Hawaiian government completed the defeudalization process in the middle of the nineteenth century through the “Great *Mahele*”—or division—which replaced the communal land tenure with fee ownership of all land. Commoners were promised one-third of the available lands and were eligible to receive land that they had cultivated plus a house lot; ultimately, however, only 8000 or so tenants received a total of 30,000 acres, which amounted to less than one percent of the total land of

---

45. See 1 RALPH S. KUYKENDALL, *THE HAWAIIAN KINGDOM 1778–1854*, at 3 (1938); GAVAN DAWS, *SHOAL OF TIME* at xii–xiii (1968); Wilkinson, *supra* note 20, at 227–28.

46. See COHEN, *supra* note 2, at 798–99; Neil M. Levy, *Native Hawaiian Land Rights*, 63 CAL. L. REV. 848, 848–49 (1975); LAWRENCE H. FUCHS, *HAWAII PONO: A SOCIAL HISTORY* 6–7 (1961)

47. See 1 KUYKENDALL, *supra* note 45, at 32–51.

48. See Bradley Hideo Keikiokalani Cooper, Comment, *A Trust Divided Cannot Stand—An Analysis of Native Hawaiian Land Rights*, 67 TEMP. L. REV. 699, 703 (1994); COHEN, *supra* note 2, at 799. As the Cohen treatise noted, Western recognition of the Hawaiian kingdom “is in contrast to the status of tribes in the Americas, whose sovereignty was considered subordinate to ‘discovering’ nations.” COHEN, *supra* note 2, at 799 (citation omitted).

49. See 1 KUYKENDALL, *supra* note 45, at 65–70; Maivân Clech Lâm, *The Kuleana Act Revisited: The Survival of Traditional Hawaiian Commoner Rights in Land*, 64 WASH. L. REV. 233, 238 (1989); Wilkinson, *supra* note 20, at 228; see also COHEN, *supra* note 2, at 799 (noting Western influence and collapse of traditional systems).

Hawaii.<sup>50</sup> The Hawaiian King controlled thirty-six percent of the land as government lands and twenty-four percent as the sovereign's personal lands (or Crown lands); the remaining thirty-nine percent was owned by chiefs and land agents.<sup>51</sup> Relatedly, there were changes to Hawaii's economy: The islands were transformed from a subsistence economy to one based on producing goods for trade, and many Native Hawaiians stopped farming on their *ahupua'a* and instead became laborers.<sup>52</sup>

This period coincided with a dramatic change in the population of the Hawaiian islands. Western and Asian foreigners migrated to Hawaii in large numbers (many as laborers), and the population of native Polynesians decreased dramatically, driven down by Western diseases and, to some extent, intermarriage with non-Polynesians.<sup>53</sup> By 1890, those descended from pre-1778 inhabitants constituted less than half of the population. A majority of the inhabitants were non-Native Hawaiians; many of them were born in Hawaii, and many were citizens of Hawaii.<sup>54</sup>

Westerners also gained political power as their numbers and wealth increased. In 1887, they gained effective control over Hawaii by means of the "Bayonet Constitution," under which the King ceded much of his power to Westerners (and disenfranchised most Native Hawaiians).<sup>55</sup> In 1893, in

50. See Levy, *supra* note 46, at 854–58; L  m, *supra* note 49, at 236–37; see also 1 KUYKENDALL, *supra* note 45, at 294 (noting that "extensive areas of crown, government, and chiefs' lands were useless mountain wastes or lava strewn deserts," whereas nearly all the commoners' lands were "very valuable for native agriculture"); JON J. CHINEN, *THE GREAT MAHELE: HAWAII'S LAND DIVISION OF 1848*, at 31 (1958) (noting that tracts awarded "to the native tenants consisted chiefly of taro lands and were considered the more valuable lands in the Islands").

51. See Levy, *supra* note 46, at 854–58; see also NOEL J. KENT, *HAWAII: ISLANDS UNDER THE INFLUENCE* 32 (1993) (contending that "[t]he ouster of the Hawaiian people from the land was an irreparable blow . . . [that] had the ultimate effect of undermining, once and for all, the viability of the 'Hawaiian way'").

52. See Levy, *supra* note 46, at 858–61; COHEN, *supra* note 2, at 799–800; see also Sumner J. La Croix & James Roumasset, *The Evolution of Private Property in Nineteenth-Century Hawaii*, 50 J. ECON. HIST. 829, 845 (1990); DEPARTMENT OF PUB. INSTRUCTION, *REPORT OF THE HAWAII GENERAL SUPERINTENDENT OF THE CENSUS, 1896*, at 72–83 (1897) [hereinafter 1896 CENSUS REPORT] (noting percentage of Native Hawaiians in various occupations).

53. See Levy, *supra* note 46, at 850, 860; FUCHS, *supra* note 46, at 12–13, 68–69.

54. See HAWAIIAN ALMANAC AND ANNUAL FOR 1893, at 11, 14 (1892); RUSS APPLE & PEG APPLE, *LAND, LILI'UOKALANI, AND ANNEXATION* 127–30 (1979); ROBERT C. SCHMITT, *DEMOGRAPHIC STATISTICS OF HAWAII 1778–1965*, at 74, 182 (1968); W.D. ALEXANDER, *A BRIEF HISTORY OF THE HAWAIIAN PEOPLE* 313 (1891); U.S. PARKER, *THE ECONOMIC HISTORY OF THE HAWAIIAN ISLANDS* 81 (1907); COHEN, *supra* note 2, at 800 n.21; ANDREW W. LIND, *HAWAII'S PEOPLE* 20–22 (4th ed. 1980); see also 1896 CENSUS REPORT, *supra* note 52, at 31–39; CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1900, at ccxvi–ccxix (1902).

The current percentage of Native Hawaiians is the subject of some dispute. The 1990 Census, which relied on self-identification, found approximately 140,000 Native Hawaiians, or 12.5% of the population. The State of Hawaii also made a tabulation in 1990 (based on the racial background of the respondents' parents) and found approximately 205,000 Native Hawaiians, or 19% of the population (and its 1992 figures, the latest available, show an increase to 221,000 people). See OFFICE OF HAWAIIAN AFFAIRS, *NATIVE HAWAIIAN DATA BOOK* 10 (1994); HAWAII DEP'T OF HEALTH, *HEALTH SURVEILLANCE SURVEY, REPORT FOR YEARS 1989–1992*, at A-66 (1996); see also ELEANOR C. NORDYKE, *THE PEOPLING OF HAWAII* 34–35, 104–09 (1989) (comparing methodologies of Census and health survey).

55. See McPherson, *supra* note 19, at 460–61; Cooper, *supra* note 48, at 704; RALPH S. KUYKENDALL, *CONSTITUTIONS OF THE HAWAIIAN KINGDOM* 44–50 (1940). In light of the enormous powers seized by

response to a threat by the reigning Queen, Lili'uokalani, to proclaim a constitution increasing the crown's power, the United States Minister in Hawaii, acting without presidential approval, ordered marines to land in Hawaii.<sup>56</sup> The next day, revolutionaries (including both Hawaiian-born Westerners and foreigners) seized the government building and declared a provisional government, which the Minister immediately recognized.<sup>57</sup> The provisional government not only abolished the monarchy, but also expropriated the Crown lands without compensation to Queen Lili'uokalani and made them available to citizens (which included most Westerners and Hawaiians, but few Asians) for purchase or long-term lease.<sup>58</sup> President Grover Cleveland denounced the United States Minister's actions and refused to submit a treaty of annexation to the Senate, but his successor, President William McKinley, supported annexation; in 1898, five years after the overthrow of Queen Lili'uokalani, the United States enacted the Annexation Act of 1898.<sup>59</sup>

The Annexation Act stated that the Republic of Hawaii had ceded, and that the United States thereupon annexed, "the absolute fee and ownership of all public, Government, or Crown lands" (though it left most of Hawaii's land laws in place).<sup>60</sup> The Annexation Act made no special provisions for Native Hawaiians (in fact, it did not mention them), but it did provide that revenues from the ceded lands "shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."<sup>61</sup>

---

Westerners, some have called the imposition of the Bayonet Constitution a coup d'état. See Lesley Karen Friedman, *Native Hawaiians, Self-Determination, and the Inadequacy of the State Land Trusts*, 14 U. HAW. L. REV. 519, 532-33 (1992); SYLVESTER K. STEVENS, *AMERICAN EXPANSION IN HAWAII 1842-1858*, at 151-53, 189 (1968).

56. In 1993, Congress passed a joint resolution that "acknowledge[d] the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and . . . offer[ed] an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii." Pub. L. No. 103-150, 107 Stat. 1510 (1993). The resolution condemns the overthrow in strong language, but its operative provisions are modest (they merely acknowledge and apologize for the overthrow and its ramifications) and appear to create no substantive rights. See *id.* § 1 (acknowledging overthrow, encouraging reconciliation, and apologizing on behalf of United States); *id.* § 3 (providing that nothing in resolution serves as settlement of claims); S. REP. NO. 103-126, at 35 (1993) (averring that "enactment of S.J. Res. 19 will not result in any changes in existing law"); see also *infra* note 195.

57. See 3 RALPH KUYKENDALL, *THE HAWAIIAN KINGDOM 1874-1893*, at 582-605 (1967).

58. See Land Act of 1895, 1895 Haw. Sess. Laws 49-83; Levy, *supra* note 46, at 863-64. Queen Lili'uokalani brought a suit against the United States demanding compensation for her expropriated lands, but the Court of Claims rejected her claim. See *Liliuokalani v. United States*, 45 Ct. Cl. 418 (1910), see also Patrick W. Hanifin, *Hawaiian Reparations: Nothing Lost, Nothing Owed*, 17 HAW. BAR J. 107, 110-11 (1982) (contending that Hawaiian government officials controlled Crown lands and that Queen Lili'uokalani "had only a right to receive the income of the Crown lands for her life").

59. Act of July 7, 1898, 30 Stat. 750.

60. See *id.*; see also Levy, *supra* note 46, at 864; COHEN, *supra* note 2, at 801.

61. 30 Stat. 750. An 1899 opinion of the United States Attorney General construed this language as subject[ing] the public lands in Hawaii to a special trust, limiting the revenue from or proceeds of the same to the uses of the inhabitants of the Hawaiian Islands for educational or other public purposes. . . . The effect of the language [in the Act] is to vest in Congress the exclusive right, by special enactment, to provide for the disposition of public lands in Hawaii.  
22 Op. Att'y Gen. 574, 576 (1899).

The 1900 Organic Act for the Territory of Hawaii, ch. 339, 31 Stat. 141, which delineated the structure of government for the territory, also made no special provisions for Native Hawaiians. It did,

Two years later, the Organic Act of 1900 removed limitations on Native Hawaiians' voting rights, and, because of the denial of citizenship to most Asians, left Native Hawaiians as the majority of voters.<sup>62</sup> Nonetheless, the economic condition of Native Hawaiians continued to deteriorate, and Congress, professing concern about Native Hawaiians' plight,<sup>63</sup> enacted the Hawaiian Homes Commission Act of 1920.<sup>64</sup> The HHCA provides long-term

---

however, explicitly provide that all citizens of the Republic of Hawaii—which included Native Hawaiians as well as Westerners—were citizens of the United States and of the Territory of Hawaii. *See id.*

62. In fact, Native Hawaiians "had a clear majority of voters through the 1922 election, and more than any other group until 1938." FUCHS, *supra* note 46, at 161; *see* 1900 Organic Act for the Territory of Hawaii ch. 339; COHEN, *supra* note 2, at 801 & n.32; DAWS, *supra* note 45, at 294.

63. The legislative history of the HHCA focuses on improving the conditions of landless Native Hawaiians. *See, e.g., Proposed Amendments to the Organic Act of the Territory of Hawaii: Hearings Before the House Comm. on the Territories*, 66th Cong. 129–31 (1920) [hereinafter 1920 Hearings] (statement of Franklin Lane, Secretary of Interior). Some commentators have suggested, however, that the real purpose of the HHCA was not to benefit Native Hawaiians but instead to protect Westerners by removing certain lands from those available for homesteading. *See, e.g., Levy, supra* note 46, at 865 ("Although the [HHCA] may be cited as a humanitarian effort for the surviving descendants of an indigenous people, it was enacted by sugar barons who would not tolerate accelerated homesteading."). A related theory is that the real purpose of the HHCA was to thwart Asian homesteading. *See* Bob Stauffer, *Real Politics*, HONOLULU WKLY., Oct. 19, 1994, at 4 (referring to HHCA as "blatantly racist (and anti-Asian) package").

64. The HHCA has an unusual history. Congress passed it in 1921 and subsequently amended it, as it might amend any ordinary legislation. In 1959, the Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959), provided, *inter alia*, that "[a]s a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State." *Id.* § 4. The Admission Act also provided that Hawaii had the power to amend certain administrative provisions of the HHCA, but that all other provisions could be amended or repealed "only with the consent of the United States, and in no other manner." *Id.* The United States thus imposed the Act on Hawaii—as part of its constitution, no less—but retained the authority to approve substantive changes (though *Coyle v. Smith*, 221 U.S. 559 (1911), might be read to suggest that the federal government's retention of such authority is constitutionally infirm).

Since 1959, the Hawaii legislature has passed a number of proposed amendments to the HHCA, many of which required the consent of Congress. *See infra* notes 65, 67, 83, 84; *see also* Admission Act § 4 (delineating which changes require federal approval). The United States has enacted two different statutes agreeing to many (though not all) of these amendments, but on both occasions the President expressed concerns about the constitutionality of giving benefits based on an apparently racial definition and suggested that the United States no longer be involved in the process of amending the HHCA. President Bush, for instance, issued a signing statement for Pub. L. No. 102-398, 106 Stat. 1953 (1992), in which he stated that federal ratification violated principles of federalism, and that Hawaii could competently administer the HHCA on its own. *See* Statement by President George Bush Upon Signing S.J. Res. 23, 28 WEEKLY COMP. PRES. DOC. 1876 (Oct. 6, 1992). He then stated:

Because the Act employs an express racial classification in providing that certain public lands may be leased only to persons having a certain percentage of blood "of the races inhabiting the Hawaiian Islands prior to 1778," the continued application of the Act raises serious equal protection questions. . . .

Thus, while I am signing this resolution because it substantially defers to the State's judgment, I urge that the Congress amend the "Act to provide for the admission of the State of Hawaii into the Union," Public Law 86-3, so that in the future the State of Hawaii may amend the Hawaiian Homes Commission Act without the consent of the United States, and note that the racial classifications contained in the Act have not been given the type of careful consideration by the Federal Government that would shield them from ordinary equal protection scrutiny.

*Id.*; *see also* Statement by President Ronald Reagan Upon Signing H.J. Res. 17, 22 WEEKLY COMP. PRES. DOC. 1462 (Oct. 27, 1986) (noting equal protection concerns and urging Congress to amend Act so that congressional consent would no longer be necessary). Congress did not follow Presidents Bush's and Reagan's suggestions about eliminating federal involvement in the HHCA amendment process.



inalienable leases (at one dollar per year) to "native Hawaiians"—defined as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778."<sup>65</sup>

In 1959, Congress passed the Admission Act, pursuant to which Hawaii became a state.<sup>66</sup> The Admission Act of 1959 required that Hawaii adopt the HHCA as a provision of Hawaii's constitution.<sup>67</sup> The Admission Act also

In 1995, Congress passed legislation that, though not consenting to any other amendments to the HHCA passed by Hawaii, creates a procedure for congressional approval of Hawaii's proposed amendments: Under the statute, if Hawaii passes a proposed amendment to the HHCA, the Chairman of the HHCA will transmit it to the Interior Secretary, and if the Secretary determines that the proposed amendment requires congressional approval, he will submit it to Congress. See Pub. L. No. 104-42, § 204, 109 Stat. 353, 361-62 (1995) (to be codified in 48 U.S.C. ch. 3).

65. HHCA § 201(a)(7). As originally enacted in 1921, the HHCA designated approximately 200,000 acres of land in Hawaii as "available lands" that would be administered by a Hawaiian Homes Commission (HHC). *Id.* §§ 202-03. The HHCA authorized the HHC to award 99-year leases (at a prescribed rent of one dollar per year) of up to 80 acres of agricultural lands, up to 500 acres of "first class pastoral lands," and up to 1000 acres of "second class pastoral lands." *Id.* § 207. Only "native Hawaiians" (i.e., those with "not less than one-half part of the blood of the races inhabiting the Hawaiian islands previous to 1778") could be lessees. *Id.* §§ 201(a)(7), 208.

Between 1921 and 1959, the main change to this arrangement was the addition of two other types of land for lease: up to one hundred acres of irrigated pastoral lands and, more significantly, "not more than one acre of any class of land to be used as a residence lot," which thus allowed homesteading for residential (rather than only agricultural or pastoral) purposes, see 48 U.S.C. § 701 (1958). In fact, some of the designated lands under the HHCA are located in urban areas, such as approximately 134 acres in the city of Honolulu, just behind an area known as Punchbowl. One other change of note was that the HHC was given the authority to trade available lands for publicly owned land of an equal value; the new land would "assume the status of available lands as though the same were originally designated." *Id.* § 698(4).

Since 1959, the Hawaii legislature (with Congress's consent) has broadened the scope of the HHCA well beyond the provision of long-term homestead leases. For instance, the Department of Hawaiian Home Lands (which oversees the implementation of the HHCA through the HHC) now has the authority to construct multifamily housing, see HHCA § 207(a); enter into contracts with real estate companies to develop available lands for commercial and multipurpose projects for the benefit of Native Hawaiians, see *id.* § 220.5; issue revenue bonds to pay for its many different kinds of development, see *id.* § 204.5, form an insurance company (or acquire an existing one) to provide "homeowner protection" for lessees, *id.* § 219.1(b); and create "enterprise zones" on available lands if it "will result in economic benefits to native Hawaiians," *id.* § 227.

66. See Act of Mar. 18, 1959, Pub. L. No. 86-3, 73 Stat. 4.

67. See *supra* note 64.

In the years since Hawaii's statehood in 1959, the Hawaii legislature has approved a number of changes to the HHCA. Some of these additions were valid upon enactment by Hawaii because they did not require the consent of the United States, see Admission Act § 4, 73 Stat. 5 (1959); other changes did require such consent but received it in one of the two federal statutes that specifically approved certain amendments to the HHCA. An example of the latter was the reduction of the blood quantum requirements for purposes of the succession of certain relatives. See *infra* text accompanying notes 82-84; see also *supra* notes 64-65. Interestingly, in both federal statutes approving changes to the HHCA, the President's signing statement articulated serious equal protection concerns about the limitation of benefits to Native Hawaiians. See *supra* note 64; *infra* note 83.

One amendment to the HHCA that Hawaii approved in 1990 but to which Congress has not consented is a purpose section of the HHCA, which articulates as one purpose "the preservation of the values, traditions, and culture of native Hawaiians." HHCA § 101(a); see also *id.* § 101(b)(5) (listing as one purpose that "the traditions, culture and quality of life of native Hawaiians shall be forever self-sustaining"). It bears note that the purpose section also seeks to support the extension of the special relationship to Native Hawaiians:

In recognition of the solemn trust created by this Act, and the historical government to government relationship between the United States and the Kingdom of Hawaii, the United States and the State of Hawaii hereby acknowledge the trust established under this Act and affirm their fiduciary duty to faithfully administer the provisions of this Act on behalf of the

granted Hawaii title to the public lands (which constituted most of the lands ceded in 1898), with the proviso that such lands and the income therefrom

shall be held by [Hawaii] as a public trust for the support of the public schools and other public educational institutions, *for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920*, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use.<sup>68</sup>

This was the first time that a statute specifically identified Native Hawaiians as beneficiaries of the ceded lands (as opposed to the smaller set of lands set aside under the HHCA).

In 1978, Hawaii passed a constitutional amendment (and subsequent statutes) providing that twenty percent of the funds received from these ceded lands would go to a new entity, the Office of Hawaiian Affairs, for the benefit of Native Hawaiians.<sup>69</sup> OHA is the main state entity that provides benefits to Native Hawaiians, and it does so in a wide range of activities, including educational programs, grants, low-interest loans, and housing assistance.<sup>70</sup> Interestingly, its benefits are not limited to "native Hawaiians, as defined in the Hawaiian Homes Commission Act";<sup>71</sup> it provides services and benefits both to "Hawaiians," defined as "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to

---

native Hawaiian beneficiaries of the Act.

*Id.* § 101(c).

68. Admission Act § 5(f) (emphasis added); *see also id.* § 5(b) (describing cessation of land).

69. *See* HAW. CONST. art. XII, §§ 4-6; HAW. REV. STAT. ANN. § 10-13.5 (Michie 1995); *see also* 1993-1994 OFF. HAWAIIAN AFF. BIENNIAL REPORT (I MUA E NA POKI'I) 5 [hereinafter OHA BIENNIAL REPORT]; Van Dyke, *supra* note 19, at 69.

The 1978 constitutional amendments produced other changes as well. For example, they created a "Native Hawaiian rehabilitation fund," into which 30% of state receipts from lands previously cultivated as sugarcane lands and from water licenses is deposited. Before Hawaiian statehood, those receipts had been designated for loans to lessees of available lands, but the state constitutional amendments creating OHA in 1978 changed the designated purpose of the receipts; now, the Department "shall use this money solely for the rehabilitation of native Hawaiians which shall include, but not be limited to, the educational, economic, political, social, and cultural processes by which the general welfare and conditions of native Hawaiians are thereby improved and perpetuated." HHCA § 213(b)(5)(A); *cf.* 48 U.S.C. 707(b) (setting aside same receipts for loans to lessees).

70. *See* OHA BIENNIAL REPORT, *supra* note 69, at 9-41.

It should be noted that there are other state programs that benefit Native Hawaiians. Many of them are designed to ensure Native Hawaiians' use of—and to prevent non-Native Hawaiians from acquiring any interest in—property on the roughly 200,000 acres that are subject to the HHCA. *See* HHCA § 209 (specifying rules for successors to leases). Others are benefits for Native Hawaiians unrelated to the HHCA that fall outside the scope of OHA. For instance, by statute Kaho'olawe Island is reserved for the practice of Native Hawaiian traditions; the only other acceptable uses are preservation, revegetation, and education. *See* HAW. REV. STAT. ANN. § 6K-3 (Michie 1995).

71. Admission Act § 5(f) (quoted above).

reside in Hawaii,"<sup>72</sup> and to "native Hawaiians," defined as Hawaiians with fifty percent or more native blood.<sup>73</sup> OHA is governed by a board of trustees, who shall be "Hawaiians" (as defined above); the trustees are elected through a state election, the only qualified voters for which are "Hawaiians."<sup>74</sup> The inclusion of "Hawaiians" has created certain difficulties for OHA, as the Admission Act provided for the betterment of those with fifty percent or more native blood, rather than all those with native blood.<sup>75</sup> OHA has been directed by the Hawaii Attorney General's office not to use funds derived from the ceded lands to better the conditions of "Hawaiians," as defined in OHA's statute,<sup>76</sup> and it has been sued by litigants arguing that it improperly gives benefits to individuals who, though "Hawaiian[]," do not meet the fifty percent blood quantum requirement.<sup>77</sup> OHA's current policy is that if it uses solely funds from ceded lands for a project, the beneficiaries must have fifty percent or more native blood; but if the ceded lands funds are matched by funds from the state government (or another source), then it opens the benefit pool to all descendants of pre-1778 inhabitants.<sup>78</sup>

Blood quantum issues have also played a prominent role in the implementation of the HHCA. Originally, the only permissible lessees were "native Hawaiians," defined as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778."<sup>79</sup> Individuals with less than the requisite fifty percent blood quantum could not obtain any interest in such a lease.<sup>80</sup> These restrictions applied even to

---

72. HAW. REV. STAT. ANN. § 10-2. This definition of "Hawaiians" may cause some confusion, as it means that an individual who was born in Hawaii but who lacks native blood is not a "Hawaiian" for purposes of OHA. As was noted above, this Article attempts to avoid such confusion by referring to all categorizations of descendants of pre-1778 inhabitants as "Native Hawaiians." See *supra* note 6.

73. See HAW. REV. STAT. ANN. § 10-2. See generally HAW. CONST. art. XII, §§ 4-6 (creating OHA and laying out its general purposes); HAW. REV. STAT. ANN. §§ 10-1 to 10-21 (laying out specific purposes and duties of OHA). Obviously, the category of "Hawaiians" encompasses all "native Hawaiians."

According to OHA figures, adding those with any percent of native blood more than doubles the number of eligible Native Hawaiians (from approximately 81,000 with 50% or more native blood to approximately 209,000 with any percentage of native blood). See OFFICE OF HAWAIIAN AFFAIRS, *supra* note 54, at 34.

74. See HAW. CONST. art. XII, § 5. An opinion of the Hawaii Attorney General found the limitation of the franchise to Native Hawaiians (as well as OHA itself) constitutional, relying on a reading of *Mancari* as approving preferences for aboriginal peoples. See 80-8 Op. Haw. Att'y Gen. 7 (1980), see also *infra* note 106.

The Hawaii Attorney General has interpreted the limitation of the franchise strictly, another 1980 opinion ruled that adopted children of Native Hawaiians could not vote in the OHA elections, because "each voter must meet the qualification of being 'Hawaiian' in his or her own right, and not on the basis of the racial descent of his or her adopted parents." 80-6 Op. Haw. Att'y Gen. 2 (1980); see also *infra* text accompanying note 86.

75. See Admission Act § 5(f).

76. See 83-2 Op. Haw. Att'y Gen. (1983).

77. See, e.g., *Price v. Akaka*, 928 F.2d 824 (9th Cir. 1990); *Hoohuli v. Anyoshi*, 631 F. Supp. 1153 (D. Haw. 1986).

78. See OHA BIENNIAL REPORT, *supra* note 69, at 5.

79. HHCA §§ 201(a)(7), 208.

80. See *id.* § 208(5) ("The lessee shall not in any manner transfer to, or mortgage, pledge, or otherwise

inheritance, irrespective of the relationship between the lessee and the decedent (though a decedent with less than the requisite amount of native blood did have a two-year grace period before the commission could take the lease back and evict her).<sup>81</sup>

The rigid rules on succession engendered some opposition, and in 1986 the blood quantum requirements were changed for purposes of the succession of certain relatives.<sup>82</sup> Under the 1986 amendments, a spouse or child can now succeed as long as she is "at least one-quarter Hawaiian."<sup>83</sup> The fifty percent blood quantum requirement applies to all other potential successors, and it still applies to everyone in situations other than succession (original lessees and transferees must have fifty percent native blood), but spouses and children with a twenty-five to forty-nine percent blood quantum now have the ability to succeed to a lease.<sup>84</sup> The larger point, though, is that blood quantum requirements are very much a part of the HHCA. Thus, to pick an example, despite a Hawaii statute providing that "[a] legally adopted individual shall be considered to be a natural child of the whole blood of the adopting parent or parents,"<sup>85</sup> the Hawaii Attorney General has officially determined that a legally adopted child of a Native Hawaiian is not automatically a "native Hawaiian" under the HHCA and must still establish herself by sufficient

---

hold for the benefit of, any other person, except a native Hawaiian, and then only upon the approval of the [HHC] . . .").

81. See *id.* § 209. Moreover, any violation of the HHCA's requirements gives the HHC the authority to "declare [a lessee's or her successor's] interest in [a] tract and all improvements thereon to be forfeited and the lease in respect thereto canceled," to remove her from the land, and to lease it anew to an eligible Native Hawaiian. *Id.* § 210.

82. Supporters of the reduction argued that the existing 50% blood requirement for succession adversely affected those Native Hawaiians with more than 50% (but less than 100%) native blood who married non-Natives and thus whose spouse and children could not qualify as successors to the lease. See H.R. REP. NO. 99-473, at 2 (1986) ("In many instances, homesteaders of fifty percent Hawaiian ancestry have spouses who are non-Native Hawaiian and neither the homesteader's spouse nor offspring have the minimum blood requirement to qualify as successors."); *Consenting to the Amendments Enacted by the Legislature of the State of Hawaii to the Hawaiian Homes Commission Act, 1920: Hearing on H.R.J. Res. 17 Before the Senate Comm. on Energy and Natural Resources*, 99th Cong. 85 (1986) (statement of Gard Kealoha, Office of Hawaiian Affairs) ("The 50% blood quantum requirement has caused many horror stories relating to the eviction of families from Hawaiian Home Lands homestead areas."). Opponents argued that the reduction in the blood quantum would adversely affect those currently eligible (i.e., those with 50% or more native blood). See H.R. REP. NO. 99-473, at 7 ("We are opposed to H.J. Res. 17 primarily because we do not believe that the Committee has taken into consideration the views of the affected people, the currently qualified Native Hawaiians.").

83. HHCA § 209. This alteration required congressional approval, which was obtained in the first of two federal acts of approval; in his signing statement, President Reagan singled out this change, stating that his equal protection concerns about the HHCA "are exacerbated by the amendment that reduces the native-blood requirement to one-quarter, thereby casting additional doubt on the original justification for the classification." Statement of President Ronald Reagan on Signing H.J. Res. 17, 22 WEEKLY COMP. PRES. DOC. 1462 (Oct. 27, 1986); see also *supra* note 64.

84. The Hawaii legislature has passed (but Congress has not consented to) legislation that would further loosen the rules on succession. The changes would add grandchildren to the list of those who could succeed to leases with only 25% native blood and would provide that, if there were no spouse, child, or grandchild who met the 25% requirement, then the lease could go to parents, siblings, or widows or widowers of relatives. See HHCA § 209(a) (1995 Supp. & historical notes).

85. HAW. REV. STAT. ANN. § 578-16(a) (Michie 1993).

documentation as a "native Hawaiian" qualified in her own right to be a lessee under the HHCA.<sup>86</sup>

In addition to state programs like OHA and the strange federal-state hybrid of the HHCA, there are also numerous federal programs that single out Native Hawaiians, providing a wide range of benefits. They include the Native Hawaiian Education Act of 1994,<sup>87</sup> the Native Hawaiian Health Care Improvement Act of 1992,<sup>88</sup> the Older Americans Act of 1965,<sup>89</sup> the Rehabilitation Act of 1973,<sup>90</sup> the Native American Programs Act of 1974,<sup>91</sup> the National Historic Preservation Act of 1966,<sup>92</sup> the Developmental Disabilities Assistance and Bill of Rights Act Amendments of 1987,<sup>93</sup> the Disadvantaged Minority Health Improvement Act of 1990,<sup>94</sup> and the Indian Health Care Amendments of 1988.<sup>95</sup> Some of these federal programs require fifty percent native blood,<sup>96</sup> but most require only descentance from pre-1778 inhabitants.<sup>97</sup> Insofar as these statutes have articulated a constitutional basis,

86. See 73-18 Op. Haw. Att'y Gen. 5 (1973); see also *supra* note 74.

87. 20 U.S.C. §§ 7901-12 (1994).

88. 42 U.S.C. §§ 11701-14 (1994).

89. *Id.* §§ 3001-58.

90. 29 U.S.C. §§ 701-95i (1994).

91. 42 U.S.C. §§ 2991-92.

92. 16 U.S.C. § 470 (1994).

93. Pub. L. No. 100-146, 101 Stat. 840 (1987) (codified as amended in scattered sections of 42 U.S.C.).

94. Pub. L. No. 101-527, 104 Stat. 2311 (1990) (codified as amended in scattered sections of 42 U.S.C.).

95. 25 U.S.C. §§ 1601-82 (1994).

96. A few simply incorporate the HHCA's definition. See Admission Act of 1959, 48 U.S.C. ch. 3, § 5(f) (1994); 38 U.S.C. § 3764(3) (1994); Pub. L. No. 104-42, § 202(2), 109 Stat. 353, 357 (1995) (to be codified at 48 U.S.C. ch. 3). Other statutes do not explicitly refer to the HHCA but use substantially the same definition. See, e.g., 12 U.S.C. § 1715z-12(d) (1994) ("The term 'native Hawaiian' means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands before January 1, 1778."); 16 U.S.C. § 396a(b) (same); *id.* § 410j-6 (same).

97. There are slight variations among these statutes. See, e.g., 16 U.S.C. § 396d(e) ("For the purposes of this section, native Hawaiians are defined as any lineal descendants of the race inhabiting the Hawaiian Islands prior to the year 1778."); *id.* § 470w(17) ("'Native Hawaiian' means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii."); 25 U.S.C. § 3001(10) (using language identical to that in 16 U.S.C. § 470w); 20 U.S.C. § 80q-14(11) (1994) ("[T]he term 'Native Hawaiian' means a member or descendant of the aboriginal people who, before 1778, occupied and exercised sovereignty in the area that now comprises the State of Hawaii."); *id.* § 2313(a)(1)(B) ("[T]he term 'Hawaiian native' means any individual any of whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii."); *id.* § 7118(b) (using language identical to that in *id.* § 2313); 29 U.S.C. § 1503(11) (1994) (same); 20 U.S.C. § 351a(16) ("'Hawaiian native' means any individual any of whose ancestors were natives prior to 1778 in the area which now comprises the State of Hawaii."); *id.* § 4402(6) ("The term 'Native Hawaiian' means any descendant of a person who, prior to 1778, was a native of the Hawaiian Islands."); *id.* § 7912(1) ("The term 'Native Hawaiian' means any individual who is (A) a citizen of the United States; and (B) a descendant of the aboriginal people, who prior to 1778, occupied and exercised sovereignty in the area that now comprises the State of Hawaii. . . ."); 42 U.S.C. § 11711(3) (using language identical to that in 20 U.S.C. § 7912); *id.* § 254s(c) ("[T]he term 'Native Hawaiian' means any individual who is (1) a citizen of the United States, (2) a resident of the State of Hawaii, and (3) a descendant of the aboriginal people, who prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii."); *id.* § 2992c(3) ("'Native Hawaiian' means any individual any of whose ancestors were natives of the area which consists of the Hawaiian Islands prior to 1778."); *id.* § 3057k (using language identical to that in *id.* § 2992c(3)).

they have usually asserted that the programs are enacted pursuant to a special relationship between the federal government and Native Hawaiians akin to that with Native Americans.<sup>98</sup>

### III. APPLICATION OF THE SPECIAL RELATIONSHIP TO NATIVE HAWAIIANS

With this background, I now turn to the central question: Are Native Hawaiians within the special relationship, so that government programs singling them out are subject to rational basis review? Or are such statutes subject to strict scrutiny under *Adarand Constructors, Inc. v. Peña*<sup>99</sup> and *City of Richmond v. J.A. Croson Co.*?<sup>100</sup>

The argument that these statutes are subject to strict scrutiny is fairly straightforward: *Mancari* drew a sharp distinction between American Indians as a racial group and members of Indian tribes as a political group.<sup>101</sup> The Court stated that the governmental policy at issue was subject to rational basis review because it applied "to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities."<sup>102</sup> Legislation singling out Native Hawaiians, however, defines them simply by non-Western ancestry—descent from "the races inhabiting the Hawaiian Islands previous to 1778"—plus (in some statutes) blood quantum.<sup>103</sup> This definition of "Native Hawaiian" is a straightforward racial classification with no suggestion of the relevance of membership in any organized group of Native Hawaiians. It does not, therefore, fall into the category of political classifications that *Mancari* upheld as subject to rational basis review; so, in light of *Adarand* and *Croson*, a court would apply strict scrutiny.

The few commentators and the two court opinions addressing whether rational basis review applies to statutes singling out Native Hawaiians have uniformly rejected the proposition that heightened scrutiny applies, but they have not fully developed the arguments for their position.<sup>104</sup> Nevertheless,

98. See, e.g., 20 U.S.C. § 7902 (containing findings); 42 U.S.C. § 11701 (same).

99. 115 S. Ct. 2097 (1995).

100. 488 U.S. 469 (1989).

101. This distinction is, of course, critical in light of *Adarand* and *Croson*, as those cases reflect the Court's vigilance in subjecting all governmental racial classifications to heightened scrutiny.

102. *Morton v. Mancari*, 417 U.S. 535, 554 (1974).

103. HHCA § 201(a)(7). On the various forms of statutory language (and the 50% versus any percent dichotomy), see *supra* notes 71–86, 96–97 and accompanying text.

104. The entirety of the reasoning in the first opinion, *Nalielua v. Hawaii*, 795 F. Supp. 1009, 1013 (D. Haw. 1990), *aff'd on other grounds*, No. 90-15842, 1991 WL 148771 (9th Cir. 1991), was that Native Hawaiians and American Indians are indigenous peoples. See *infra* text accompanying notes 105–06; see also *supra* note 18. The second opinion, *Rice v. Cayetano*, Nos. Civ.96-00390 DAE, Civ.96-00616 DAE, 1996 WL 562072 (D. Haw. Sept. 6, 1996), relied in part on *Nalielua* and in part on two other arguments addressed here: that *United States v. John*, 437 U.S. 634 (1978), and *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977), expanded *Mancari*'s application beyond federally recognized tribes, see *infra* Section III.A; and that Congress's passage of statutes for Native Hawaiians creates a special relationship between the federal government and Native Hawaiians, see *infra* Section III.E. The one article devoted to the question of the existence of a special relationship between the federal government and Indian tribes,

one can posit a number of arguments that would support the application of rational basis review to programs for Native Hawaiians: first, that *Mancari* and later cases do not limit the special relationship to Indian tribes and their members, and instead indicate that all preferences for Native Americans are subject to rational basis review; second, that *Mancari* does impose a limit, but merely that the relevant statutory definition of Native Americans must be political (not that the group must be a tribe), and the definition of Native Hawaiian qualifies because it excludes those whose ancestors arrived after 1778; third, that even if *Mancari* does limit the special relationship (and therefore rational basis review) to Indian tribes, Native Hawaiians currently constitute a tribe; fourth, that Native Hawaiians may not constitute a tribe, but they nonetheless should be treated as a tribe in light of their history and their treatment by the federal government; and fifth, that even if *Mancari* limits the special relationship to tribes and Native Hawaiians are not a tribe, the history of federal legislation treating Native Hawaiians specially has effectively conferred tribal status on them.

#### A. *The Special Relationship Extends to All Native Americans*

One possible argument is that preferences for Native Hawaiians would not be subject to strict scrutiny because the Court has never suggested that preferences for members of nontribal groups are suspect and in fact has indicated that the special relationship extends beyond the narrow confines of the category of federally recognized tribes to include all Native Americans. This is the apparent position of the one federal court to consider an equal protection challenge to a statute providing benefits to Native Hawaiians, *Nalielua v. Hawaii*.<sup>105</sup> In that case, the District Court in Hawaii upheld the singling out of Native Hawaiians in the HHCA, stating that *Mancari* had applied rational basis review to statutes that benefit "Indians," and that "Indians" included Native Hawaiians.<sup>106</sup>

---

see Houghton, *supra* note 19, did not address the constitutional question directly and thus did not focus on the arguments for similar treatment of Indian tribes and Native Hawaiians. It relied exclusively on a definition formerly used by the BIA that was propounded by a BIA official and Indian scholar. This Article addresses the inapplicability of that test. See *infra* note 156. The only other article to address squarely the level of scrutiny for programs for Native Hawaiians, see Van Dyke, *supra* note 19, made one of the arguments discussed in this Article: that the definition of Native Hawaiian is a "political" classification within the meaning of *Mancari*. See *id.* at 75; *infra* note 146. This argument is addressed in Section III.B.

105. 795 F. Supp. 1009 (D. Haw. 1990), *aff'd on other grounds*, No. 90-15842, 1991 WL 148771 (9th Cir. 1991). But see *Hooihuli v. Ariyoshi*, 631 F. Supp. 1153, 1159 n.22 (D. Haw. 1986) (noting that plaintiffs did not challenge preferences for Native Hawaiians and stating that, "if plaintiffs were Caucasians [sic] challenging appropriations to both 'Hawaiians' [defined as those descended from indigenous peoples] and 'native Hawaiians,' [defined as those with at least 50% native blood] 'strict scrutiny' might be the appropriate standard").

106. See *Nalielua*, 795 F. Supp. at 1012-13. The Ninth Circuit found that the plaintiff lacked standing to bring an equal protection challenge to the HHCA's preference for Native Hawaiians, and so the court simply affirmed based on standing without reaching the constitutional issue. See *Nalielua*, 1991 WL 148771, at \*1.

Although the district court's mere assertion seems inadequate, the argument can be articulated in a more persuasive form. First, neither *Mancari* nor any other case directly stated that statutes applying to American Indians as a racial group would be subject to strict scrutiny, or even that the special relationship was limited to Indian tribes and their members. By its terms, *Mancari* merely held that the preference at issue, which was limited to members of tribes, was subject to rational basis review. Second, in two cases decided after *Mancari*—*Delaware Tribal Business Committee v. Weeks*<sup>107</sup> and *United States v. John*<sup>108</sup>—the Court demonstrated some flexibility in applying the tribe/race distinction, thereby leaving open the possibility of rational basis review for statutes giving preferences to Native Americans. Third, *Mancari* implicitly recognized that Native Americans share a crucial similarity that no other groups share—the destruction of their sovereign authority over their land—and it, along with *Weeks* and *John*, intimates that the appropriate dividing line for the special relationship is between Native Americans and other racial or ethnic groups, not Indian tribes and racial groups.

At the outset, this argument raises the threshold issue of whether Native Hawaiians are "Indian[s]" for constitutional (and therefore special relationship) purposes.<sup>109</sup> This question is central to every argument in favor of extending the special relationship to Native Hawaiians, in light of the grounding of the special relationship in the Constitution. Fortunately, courts have provided some guidance. The few cases addressing the issue have treated Native Hawaiians as "Indian[s]" for constitutional purposes.<sup>110</sup> More important, a large number of courts have treated Alaska Natives<sup>111</sup> as "Indian[s]" for purposes of the special relationship, thereby indicating that "Indian" is not limited to the native inhabitants of the first forty-eight (or original thirteen) states;<sup>112</sup> and it seems

---

The Hawaii Attorney General applied similar reasoning in a 1980 legal opinion concluding that the limitation of the board of trustees of OHA to "Hawaiians" (defined as those descended from pre-1778 inhabitants) was constitutional. See 80-8 Op. Haw. Att'y Gen. 7 (1980). The Attorney General construed *Mancari* as according "special equal protection treatment to legislation singling out for special treatment *Native Americans or aboriginal people*." *Id.* (emphasis added). The opinion then concluded that OHA was constitutional under this standard.

107. 430 U.S. 73 (1977).

108. 437 U.S. 634 (1978).

109. See U.S. CONST. art. I, § 8, cl. 3 (giving Congress power "[t]o regulate Commerce . . . with the Indian Tribes").

110. See *Nalielua*, 795 F. Supp. at 1012-13; *Ahuna v. Department of Hawaiian Home Lands*, 640 P.2d 1161, 1168-69 (Haw. 1982).

111. "Alaska Natives" are generally treated as comprising Aleuts, Eskimos, and Indians whose ancestral residence in Alaska preceded that of Europeans. See *Pence v. Kleppe*, 529 F.2d 135, 138 n.5 (9th Cir. 1976); THOMAS R. BERGER, *VILLAGE JOURNEY* at vii-viii (1985); COHEN, *supra* note 41, at 401.

112. See *Alaska Pac. Fisheries v. United States*, 248 U.S. 78 (1918); *Native Village of Tyonek v. Puckett*, 957 F.2d 631 (9th Cir. 1992); *Alaska Chapter, Assoc. Gen. Contractors of America v. Pierce*, 694 F.2d 1162 (9th Cir. 1982); *Pence*, 529 F.2d at 138 n.5; *Alaska v. Annette Island Packing Co.*, 289 F. 671 (9th Cir. 1923); *Cape Fox Corp. v. United States*, 4 Cl. Ct. 223 (1983); *Aguilar v. United States*, 474 F. Supp. 840 (D. Alaska 1979); *Eric v. HUD*, 464 F. Supp. 44 (D. Alaska 1978); see also *Morton v. Ruiz*,



doubtful that a court would treat native peoples of Alaska as Indians but not extend such treatment to Native Hawaiians. Thus, though it is possible that a court would ignore the existing case law and conclude that Native Hawaiians are not "Indian[s]" within the meaning of the Indian Commerce Clause, it seems more likely that it would adopt the prevailing view and treat that clause's reference to "Indian[s]" as encompassing Native Hawaiians.

Assuming, then, that Native Hawaiians would be treated as "Indian[s]" for constitutional purposes, the argument that the special relationship extends to all "Indian[s]" nonetheless fails, for a number of reasons. First, the Court has grounded the special relationship primarily in the Indian Commerce Clause,<sup>113</sup> and that clause gives Congress the power to regulate commerce "with the Indian Tribes,"<sup>114</sup> not with Indians generally.<sup>115</sup> The Court has

415 U.S. 199, 212 (1974) (noting special status of "Indians" in Alaska, thus apparently intimating that Alaska Natives are "Indian[s]" for constitutional purposes)

113. See *supra* notes 24–29, 35–36 and accompanying text

114. U.S. CONST. art. I, § 8, cl. 3. This language parallels the Clause's reference to international commerce ("Commerce with foreign nations"), *id.* (emphasis added), rather than interstate commerce ("Commerce . . . among the several states"), *id.* (emphasis added), thereby underscoring the similarity of Indian tribes to sovereign nations, rather than to racial or ethnic groupings

One other textual matter bears mention: the Indian Commerce Clause empowers Congress vis-à-vis "the Indian Tribes," and it is not obvious that the authority it confers should be construed to apply with equal force to tribal members. A dichotomy between a tribe and its members is arguably implicit in the notion of the special relationship as a government-to-government relationship. *Morton v. Mancari*, 417 U.S. 535 (1974), however, resolved this question for purposes of the current case law (and therefore for purposes of this Article): *Mancari* held that the special relationship allows the federal government to single out members of Indian tribes for benefits.

115. The Court in *Mancari* suggested that an additional constitutional basis of the special relationship was the Treaty Clause of Article II, U.S. CONST. art. II, § 2, cl. 2, which gives the President the authority, by and with the advice and consent of the Senate, to make treaties. The Court noted that this Clause "has often been the source of the Government's power to deal with Indian tribes" *Mancari*, 417 U.S. at 552, see also *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n 7 (1973) ("[F]ederal authority over Indian matters . . . derives from federal responsibility for regulating commerce with Indian tribes and for treaty making."). The Court thus classified the Treaty Clause as one involving the government's relations with Indian tribes. This makes sense, as the Clause gives the President the power to make treaties, presumably with other governments. Nothing in the Clause suggests that it also gave the President the power to make agreements with a racial group (and it should be noted that the Clause does not mention Indians).

In addition to the Indian Commerce Clause, there are two other references to Indians in the Constitution: the references to "Indians not taxed" in U.S. CONST. art. I, § 2, cl. 3 (apportionment shall exclude "Indians not taxed"), and U.S. CONST. amend. XIV, § 2 (same). Two professors, but not the Supreme Court, have suggested that these references are another possible source of power to deal with Indians. See Williams, *supra* note 42, at 830–50; Carole Goldberg-Ambrose, *Not "Strictly" Racial: A Response to "Indians as Peoples"*, 39 UCLA L. REV. 169, 175, 189–90 (1991). Professor Goldberg-Ambrose argues: "While the Indian Commerce Clause refers to tribal groups, the 'Indians not taxed' language embraces Indians as individuals." Goldberg-Ambrose, *supra*, at 189. On this basis, she contends that the "Indians not taxed" language permits Congress to legislate not only for Indian tribes and their members but also for Indians defined racially. See *id.* at 190. This fails as a textual argument, however, because all Indians are taxed today (because all are citizens, pursuant to a 1924 statute) and all are included in the apportionment. See 8 U.S.C. § 1401 (1994) (providing that all Indians are citizens), see also 1 UNITED STATES DEP'T OF THE INTERIOR, OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR RELATING TO INDIAN AFFAIRS, 1917–1974, at 995–97 (1979) [hereinafter OPINIONS OF THE SOLICITOR] (Opinion of Nov. 7, 1940) (announcing that no one is excluded from apportionment, because there are no "Indians not taxed" after citizenship law); David C. Williams, *Sometimes Suspect: A Response to Professor Goldberg-Ambrose*, 39 UCLA L. REV. 191, 195 (1991) (writing that, as textual matter, "the 'Indians not taxed' clause cannot ground a special relationship between Congress and any Indians, because

shown no inclination to construe the phrase "Indian Tribes" to mean simply "Indians," and there is no reason to believe it will ignore the additional word "Tribes."<sup>116</sup> As a result, preferences that exceed the scope of the Clause and have a racial element would appear to be subject to strict scrutiny under ordinary equal protection principles.

Second, *Mancari* clearly indicated that the special relationship was limited to tribes. *Mancari*'s central distinction was between Indian tribes as a political classification and Indians as a racial classification. The Court's analysis of the equal protection issue focused—and turned—on the special relationship with Indian tribes, not with Indians generally. In fact, the Court began its analysis of the equal protection challenge by stating that "[r]esolution of the instant issue turns on the unique legal status of *Indian tribes* under federal law."<sup>117</sup> Any remaining doubt on this score is erased by the Court's explication:

The preference is not directed towards a "racial" group consisting of "Indians"; instead, it applies only to members of "federally recognized" tribes. This operates to exclude many individuals who are

---

it now applies to no Indians at all"). Thus, even if one were to read the exclusion of "Indians not taxed" from apportionment as giving a textual basis for Congress's legislating outside of the strictures of the Equal Protection Clause for the Indians so described, the power is meaningless because the group so described no longer exists. Professor Williams takes an extratextual approach, arguing that "Indians not taxed" does not refer to untaxed Indians per se (who do not exist), but rather to the category that Congress intended to include in this group—tribal Indians. See Williams, *supra* note 42, at 832–41 (presenting historical evidence that "Indians not taxed" was intended to refer to tribal Indians). This construction of "Indians not taxed" would not expand the scope of the special relationship to all Indians—the interpretation would cover only tribes that "retain[] enough sovereignty to control the texture of daily life on the reservation," *id.* at 831—but instead would serve as an alternate grounding for the special relationship with tribal entities. See *id.* at 776–86 (rejecting Indian Commerce Clause as possible ground for rational basis review of statutes treating members of Indian tribes specially and noting need for an alternative basis for special relationship). This reading, then, also does not appear to provide a basis for extending the special relationship to all Indians.

I will not discuss these arguments at length, because the point of this Article is to examine the status of Native Hawaiians under the prevailing jurisprudence, and the Supreme Court has never suggested that the Constitution's references to "Indians not taxed" are relevant, much less a foundation for the special relationship. See *Squire v. Capoean*, 351 U.S. 1, 6 (1956); see also *Duro v. Reina*, 495 U.S. 676, 692 (1990) ("That Indians are citizens does not alter the Federal Government's broad authority to legislate with respect to enrolled Indians as a class, whether to impose burdens or benefits.").

116. The Court has been willing to construe the Indian Commerce Clause expansively—after all, in the many cases since *McClanahan* emphasized the Clause, the Court has never found, or even suggested, that the Clause might not support a given federal government action with respect to Indian tribes—and it may be willing to construe the term "Tribe[]" more broadly than the Executive Branch has, see *infra* notes 157–67 and accompanying text, but it has never intimated that it would read the word "Tribes" out of the Indian Commerce Clause. The Court's treatment of the Interstate Commerce Clause (which is, of course, part of the same sentence in the Constitution) is perhaps instructive. As expansively as the Court has interpreted "Commerce . . . among the several states," it has always tied the regulated actions to some aspect of interstate commerce, see *Perez v. United States*, 402 U.S. 146 (1971); *Wickard v. Filburn*, 317 U.S. 111 (1942). And the Court's recent invalidation of the Gun-Free School Zones Act in *United States v. Lopez*, 115 S. Ct. 1624 (1995), underscored the Court's unwillingness to construe the Clause as if no interstate nexus were required. The Court's treatment of the Interstate Commerce Clause thus may suggest, albeit inferentially, that the Court may construe the word "Tribe[]" broadly, but would not ignore it altogether.

117. *Mancari*, 417 U.S. at 551 (emphasis added).

racially to be classified as “Indians.” *In this sense*, the preference is political rather than racial in nature.<sup>118</sup>

Thus, far from embracing the suggestion that all “Indians” could be in a political classification that was subject to the special relationship, the Court specifically suggested that some members of the race would not qualify, and that this exclusion demonstrated that the classification was political and therefore subject to rational basis review. The Court clarified that the preference was political, and permissible pursuant to the special relationship, because it was limited to members of federally recognized tribes.

The proposition that benefits for American Indians generally could also be subject to rational basis review cannot be squared with *Mancari*’s careful differentiation of tribal versus racial classifications. The Court, in its discussion of Congress’s power to deal with Indian tribes, did quote an earlier case noting that “‘the United States overcame the Indians and took possession of their lands, sometimes by force,’”<sup>119</sup> and this quotation does raise the issue of the federal government’s deprivation of the sovereignty and land of “the Indians”; but any implication that the Court was relying on this history of subjugation and dispossession in rejecting *Mancari*’s equal protection challenge is eviscerated by the subsequent discussion of that challenge.<sup>120</sup> If the Court’s view had been that all preferences for dispossessed, formerly sovereign indigenous peoples (i.e., Native Americans) are subject to rational basis review, it presumably would have written a very different opinion, one focusing on what is unique about Native Americans, rather than what is unique about Indian tribes. In actuality, *Mancari*’s central distinction was between tribes and nontribes, rather than Indians and non-Indians.<sup>121</sup> In order to give the Court’s reasoning meaning, we must assume that something turned on this distinction; the only available candidate (because it was the only issue addressed by the Court in the equal protection section) is the appropriate level of scrutiny.

There is, as was suggested above, a counterargument to this emphasis on *Mancari*: In some subsequent cases—in particular *Delaware Tribal Business*

---

118. *Id.* at 553 n.24 (emphasis added).

119. *Id.* at 552 (quoting *Board of County Comm’rs v. Seber*, 318 U.S. 705, 715 (1943)).

120. See *supra* text accompanying note 118.

121. In addition, construing *Mancari* as recognizing a special relationship with all Native Americans would render inexplicable the opinion’s avoidance of the relevant statutory language in favor of the BIA regulation that applied to the statute. See *id.* at 553 n.24; *supra* note 38. The obvious explanation for the Court’s strange move—relying on the BIA regulation and failing to mention, much less quote, the statutory language—is that the statute (the IRA, 25 U.S.C. § 479 (1994)) gave benefits to members of federally recognized tribes and “all other persons of one-half or more Indian blood,” whereas the BIA regulation limited the preference to members of federally recognized tribes; thus, relying on the regulation allowed the Court to construe the preference as limited to members of Indian tribes. If the Court did not so intend to limit the special relationship, it is difficult to fathom why it treated the statute in the way that it did.

*Committee v. Weeks*<sup>122</sup> and *United States v. John*<sup>123</sup>—the Court did not emphasize the tribal nature of the preferences at issue. In *Weeks*, the Court upheld a federal statute's distribution of an award based on a nineteenth-century treaty to two recognized Indian tribes (the Cherokee Delawares and the Absentee Delawares) and its exclusion of a nonrecognized group (the Kansas Delawares). The Court noted in a footnote, however, that, though Cherokee Delaware recipients had to be tribal members, Absentee Delaware eligibility was "defined somewhat more broadly, so that some nonmembers of the tribe are eligible under the statute"; yet the Court did not discuss this point or suggest that it had any significance.<sup>124</sup> In *John*, the Court held that the Indian Reorganization Act of 1934 (IRA) applied to the Choctaw Indians, even though they did not have a reservation or a constitution at that time. In so holding, the Court emphasized the breadth of the IRA: "The 1934 Act defined 'Indians' not only as 'all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction,' and their descendants who then were residing on any Indian reservation, but also as 'all other persons of one-half or more Indian blood.'"<sup>125</sup> The Court did not suggest that this definition raised any constitutional concerns.

The Court's treatment (or lack thereof) of these points in *Weeks* and *John* seems problematic, in light of *Mancari*'s heavy emphasis on the tribe/race distinction. The crucial question, though, is whether, in light of *Weeks* and *John*, *Mancari*'s clear limitation to tribes still applies; for several reasons, the answer is yes.

In neither *Weeks* nor *John* did the Court in any way intimate that it was altering—or even revisiting—*Mancari*'s equal protection analysis, much less that it was supplanting it with an emphasis on American Indians' shared

122. 430 U.S. 73 (1977).

123. 437 U.S. 634 (1978).

124. 430 U.S. at 82 n.14. The Court's silence is particularly remarkable in light of Justice Blackmun's concurrence and Justice Stevens's dissent, both of which noted that the benefit was not limited to tribal members. See *id.* at 90 (Blackmun, J., concurring in part and in the result) (stating that Court's suggestion of tribe/nontribe distinction "is undermined by the fact that Absentee Delawares who are not members of that tribe nevertheless are entitled to participate"); *id.* at 94 (Stevens, J., dissenting) (rejecting Court's reliance on *Mancari* because "some of those who would share in the distribution on behalf of the Absentee Delawares are not members of that tribe").

It is unsurprising that Justice Blackmun, who wrote the Court's opinion in *Mancari*, would have emphasized tribal membership. It is worth noting, however, that Blackmun (along with Chief Justice Burger) concurred in the result, because

[t]here necessarily is a large measure of arbitrariness in distributing an award for a century-old wrong. One could regard the distribution as a windfall for whichever beneficiaries are now favored. In light of the difficulty in determining appropriate standards for the selection of those who are to receive the benefits, I cannot say that the distribution directed by the Congress is unreasonable and constitutionally impermissible.

*Id.* at 91 (Blackmun, J., concurring in part and in the result).

125. 437 U.S. at 650 (bracketing in original) (quoting IRA, 25 U.S.C. § 479 (1976)). This is somewhat ironic, as the same statute (the IRA), and thus the same definition of "Indian," was at issue in *Mancari* (which was decided four years earlier), and in that case the Court construed the IRA, pursuant to the relevant regulations, as applying only to Indian tribes. See *Mancari*, 417 U.S. at 553 n.24.

history of subjugation and dispossession.<sup>126</sup> In *Weeks*, in fact, the Court applied *Mancari* and emphasized that "the Kansas Delawares are not a recognized tribal entity, but are simply individual Indians with no vested rights in any tribal property."<sup>127</sup> The Court's holding relied in part on the tribal status of the recipient groups and the nontribal status of the excluded Kansas Delawares. We may question the Court's treatment of the Absentee Delawares—or, more precisely, the Absentee Delawares as defined by the relevant statute, rather than by tribal rolls—as a tribe,<sup>128</sup> but we are still left with a case in which the Court, far from rejecting *Mancari*'s emphasis on tribes, upheld the distribution based in part on the tribe/race dichotomy. The Court permitted a statutory definition of a tribe that included some individuals who would have qualified as Absentee Delawares under the tribal constitution but for their blood quantum (and, significantly, all of the actual recipients would have been eligible to be included on the tribe's 1940 census roll);<sup>129</sup> it never intimated that Indians who could not reasonably be considered to be tribal members nonetheless could be subject to the special relationship. In *John*, too, the context of the case mitigates the significance of its reference to racial Indians as "Indians" for certain purposes. John was a member of the Choctaw tribe, so there was no issue of the application of the special relationship to someone who was not connected to a tribe; the only question was whether the Choctaws had been a tribe at the time the relevant acts were passed. And, in light of the Court's conclusion that the Choctaws were an "Indian tribe," it did not address the equal protection ramifications of a contrary finding. Once again, the Court did not disparage the constitutional significance of affiliation with a tribe; indeed, it relied on the tribal status of the Choctaws in concluding that certain federal laws applied to them.

---

126. Moreover, even assuming that the Court had cast doubt on the tribe/nontribe distinction, it is not at all clear that the Court would replace that distinction with a Native/non-Native American dichotomy, whereby it would apply *Mancari* to benefits for Native Americans and *Adarand* to benefits for other minority groups. The argument for such a change, after all, would depend on the contestable assertion that the destruction of Native Americans' sovereign authority over their land (and the government's involvement in it) was so different from the deprivations suffered by other racial minorities that a completely different level of scrutiny would apply to programs benefiting Native Americans. Cf. Williams, *supra* note 42, at 817–18 ("The historical dispossession argument still does not adequately distinguish Indians from other racial groups, particularly African-Americans."); Johnson & Crystal, *supra* note 40, at 589 n.19 (comparing American Indians with African Americans).

One could argue, of course, that both Native Americans and African Americans are entitled to special treatment, and that programs benefiting them should be subject only to rational basis review. Such an argument, however, depends on the overruling of *Adarand* and *Crosan*, and the purpose of this Article is to address the current status of Native Hawaiians and the possibilities of changing that status in light of current constitutional doctrines.

127. *Delaware Tribal Bus. Comm.*, 430 U.S. at 85.

128. This appears to have been Justice Blackmun's position. See *id.* at 90 (Blackmun, J., concurring).

129. See Brief for the Absentee Delaware Tribe Business Committee at 52, *Absentee Delaware Tribe of Oklahoma Bus. Comm. v. Weeks*, 430 U.S. 73 (1977) (No. 75-1335); *Weeks v. United States*, 406 F Supp. 1309, 1339 n.40 (W.D. Okla. 1975).

Moreover, in other cases the Court has articulated the special relationship in terms of tribal status and has never intimated that a shared history of subjugation and dispossession is sufficient. Thus, the Court has stated that "federal regulation of Indian tribes . . . is governance of once-sovereign political communities; it is not to be viewed as legislation of a "racial" group consisting of "Indians"'"<sup>130</sup> and has referred to "legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive."<sup>131</sup>

130. *United States v. Antelope*, 430 U.S. 641, 646 (1977) (quoting *Mancari*, 417 U.S. at 553 n.24). In that case, criminal defendants contended that their right to equal protection had been violated because they had been subject to a harsher, federal sentence based on their status as Indians. The Court, in rejecting this argument, emphasized—and relied on—the special status of tribes, as distinguished from American Indians as an ethnic group. The Court began by stating that "federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications." *Id.* at 645. Then, after quoting both *Mancari* and *Fisher v. District Court*, 424 U.S. 382 (1976), at length, the Court stated that federal regulation of Indian affairs "is rooted in the unique status of Indians as 'a separate people' with their own political institutions. . . . Indeed respondents were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur d'Alene Tribe." *Antelope*, 430 U.S. at 646.

Interestingly, the statute at issue in *Antelope* was not explicitly limited to tribal members. In a footnote immediately after the passage quoted above, the Court noted the breadth of the definition but reserved judgment on the equal protection issues it raised, relying instead on the defendants' status as tribal members:

It should be noted, however, that enrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction, at least where the Indian defendant lived on the reservation and "maintained tribal relations with the Indians thereon." *Ex parte Pero*, 99 F.2d 28, 30 (7th Cir. 1938); *see also* *United States v. Ives*, 504 F.2d 935, 953 (9th Cir. 1974) (dicta). Since respondents are enrolled tribal members, we are not called on to decide whether nonenrolled Indians are subject to 18 U.S.C. § 1153, and we therefore intimate no views on the matter.

*Id.* at 647 n.7. The broadening of the special relationship (at least as to federal jurisdiction) to which the Court referred, then, was only to Indians who live on a reservation and "maintain tribal relations." This clearly would not encompass a further expansion to Indians who are not connected to a tribe or tribal reservation. And, of course, the Court did not even endorse this slight extension of the special relationship, as the Court noted that the relevant parties were enrolled tribal members. Moreover, the first paragraph of the footnote emphasized that federal jurisdiction "does not apply to 'many individuals who are racially to be classified as "Indians."'" *Id.* (quoting *Mancari*, 417 U.S. at 553 n.24).

131. *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (1979). The full quotation is particularly revealing: "It is settled that 'the unique legal status of *Indian tribes* under federal law' permits the Federal Government to enact legislation singling out *tribal Indians*, legislation that might otherwise be constitutionally offensive." *Id.* at 500–01 (emphases added) (quoting *Mancari*, 417 U.S. at 551).

The Supreme Court applied similar reasoning in *Fisher*. There, the Court held that denying access to state courts and forcing litigants to tribal court did not constitute impermissible racial discrimination because "[t]he exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law." 424 U.S. at 390. Also relevant is *United States v. Mazurie*, 419 U.S. 544 (1975). In that case, the Court upheld the delegation of authority to tribes to regulate alcohol, because tribes were different from other groups of people: "Indian tribes are unique aggregations possessing attributes of sovereignty both over their members and their territory, *Worcester v. Georgia*, [31 U.S.] 6 Pet. 515, 557 (1832); they are 'a separate people' possessing 'the power of regulating their internal and social relations . . .'" *Id.* at 557 (quoting *United States v. Kagama*, 118 U.S. 375, 381–82 (1886)). The Court then stated that "[c]ases such as *Worcester* and *Kagama* surely establish the proposition that Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations.'" *Id.* (citations omitted in original). The Court also emphasized the special status of tribes (and quoted this language from *Mazurie*) in *United States v. Wheeler*, 435 U.S. 313, 322–23 (1978). Finally, the Court's only statement on this issue since 1980 invokes the importance of membership in a tribe; in *Duro v. Reina*, 495 U.S. 676 (1990), the Court rejected an argument based on American Indians' U.S. citizenship, stating: "That Indians are citizens does not alter the Federal

This is consistent with the Court's reliance on the Indian Commerce Clause as the source of Congress's authority to single out Indians. As was noted above, the Clause empowers Congress to regulate commerce with "the Indian Tribes." In order to accept the contention that the Court has expanded the special relationship to all Indians, one must assume that the Supreme Court either has abandoned the Indian Commerce Clause as the constitutional grounding for the special relationship or has ignored its limitation to tribes; there are no cases that intimate the doctrinal changes that could support either assumption.

Perhaps the most significant point, however, is that *Adarand Constructors, Inc. v. Peña*<sup>132</sup> and *City of Richmond v. J.A. Croson Co.*<sup>133</sup> have changed the constitutional landscape. In the 1970s, when *Weeks* and *John* (and, for that matter, all of the Supreme Court cases directly confronting the constitutionality of laws singling out American Indians)<sup>134</sup> were decided, the Court had not clarified the level of scrutiny that would be applied to laws containing racial classifications designed to benefit minority groups. Since that time, *Adarand* and *Croson* have squarely held that strict scrutiny applies to legislation containing a racial or ethnic classification, irrespective of whether the legislation was intended to harm or benefit the relevant group. Thus, insofar as the cases cited above left open the question of the appropriate level of scrutiny for legislation containing racial classifications of Native Americans, *Adarand* and *Croson* appear to have answered the question.<sup>135</sup>

*Adarand* and *Croson* are particularly relevant because the programs at issue in those cases included Native Americans, defined racially, among the enumerated beneficiaries (and none had any references to tribal affiliation). In *Adarand*, the presumptively disadvantaged groups were "'Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities.'"<sup>136</sup> In *Croson*, the relevant definition was "'Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.'"<sup>137</sup> Similarly, the statute in *Fullilove v. Klutznick*<sup>138</sup> applied to "Negroes, Spanish-speaking, Orientals,

---

Government's broad authority to legislate with respect to enrolled Indians as a class, whether to impose burdens or benefits." *Id.* at 692 (emphasis added).

132. 115 S. Ct. 2097 (1995).

133. 488 U.S. 469 (1989).

134. *Yakima Nation*, 439 U.S. 463, was the last Supreme Court case that squarely addressed this issue. See *supra* note 44.

135. It bears mentioning that Justice Stevens's dissent in *Adarand* seems to suggest that, under the majority's view, strict scrutiny applies to classifications of Native Americans. In criticizing the Court's view of "consistency," Justice Stevens stated that the Court "should reject a concept of 'consistency' that would view the special preferences that the National Government has provided to Native Americans since 1834 as comparable to the official discrimination against African Americans that was prevalent for much of our history." *Adarand*, 115 S. Ct. at 2121 (Stevens, J., dissenting) (footnote omitted). The point of this criticism presumably is that the Court's concept of consistency did equate the two.

136. *Id.* at 2102 (emphasis added) (quoting Small Business Act, 15 U.S.C. §§ 637(d)(2)-(3) (1994)).

137. *Croson*, 488 U.S. at 478 (quoting RICHMOND, VA., CODE § 12-23 (1985)) (emphasis added).

138. 448 U.S. 448 (1980).

*Indians, Eskimos, and Aleuts*,<sup>139</sup> and the program at issue in *Metro Broadcasting, Inc. v. FCC*<sup>140</sup> applied to "those of Black, Hispanic Surnamed, *American Eskimo, Aleut, American Indian* and Asiatic American extraction."<sup>141</sup> In none of these cases did the Supreme Court intimate in any way that the benefits for Native Americans would be subject to rational basis review.

Admittedly, the particular applications challenged in *Adarand, Croson, Metro Broadcasting*, and *Fullilove* did not involve Native Americans, and it is possible that the Court intended to apply a different standard of review to classifications of Native Americans. Nothing in any of the opinions gives any support to this reading, however. The Court treated the relevant provisions as containing a series of racial or ethnic classifications, not as an agglomeration of racial and nonracial ones. In fact, in *Croson* the Court specifically referred to the benefited classes other than African Americans (namely, "Spanish-speaking, Oriental, Indian, Eskimo, or Aleut") as "racial groups."<sup>142</sup>

139. *Id.* at 454 (quoting Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2) (Supp. II 1976)) (emphasis added).

140. 497 U.S. 547 (1990).

141. *Id.* at 553 n.1 (emphasis added) (quoting Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 980 n.8 (1978)).

142. *Croson*, 488 U.S. at 506. Indeed, in the same paragraph the Court made an additional statement that appears to treat the Native American groups as subject to strict scrutiny: The Court stated that "[t]here is *absolutely no evidence of past discrimination* against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry." *Id.* (second emphasis added). The emphasis on past discrimination is significant, because such discrimination (as the Court had just finished explaining) is crucial in meeting the requirements of strict scrutiny, but, of course, totally unnecessary in the rational basis context. If the Court had considered preferences for Native Americans to be subject to rational basis review (just like, say, preferences for optometrists, as in *Williamson v. Lee Optical, Inc.*, 348 U.S. 483 (1955)), then presumably it would not have mentioned them in focusing on the absence of past discrimination (just as it would not have with respect to a classification of optometrists).

Concededly, it could be argued that the Court mentioned these other groups (i.e., "Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons") in an effort to show that the provision was not narrowly tailored, and that there was no suggestion that the groups were racial. The paragraph following the one quoted above, which focuses on the absence of narrow tailoring, provides some support for this hypothesis. There are two problems with this reading, however. The first is the aforementioned reference to the other groups as "racial groups." The second is the fact that the quoted paragraph appears immediately after one concluding that the city of Richmond had failed to demonstrate a compelling interest for its preference for African Americans because it could not point to any identified past discrimination. In the quoted paragraph, the Court then turned to the classification of the other groups. The placement of the quoted statement about past discrimination and the other groups, then, suggests (albeit obliquely) that the Court was similarly subjecting these other classifications to the compelling interest analysis of strict scrutiny.

It might be contended that the Court was simply rejecting Richmond's inclusion of Native Americans (because Richmond had no history of discrimination against them) without casting any doubt on the federal government's (or state governments') ability to benefit Native Americans based on discrimination that occurred outside of the Richmond construction industry. The upshot of *Mancari*, though, is that classifications of Indian tribes are subject to rational basis review (like benefits for optometrists), so a history of discrimination is unnecessary (and generally irrelevant).

It might also be argued that the Court was suggesting that the inclusion of Native Americans could not survive any level of review (including rational basis), so that there is no reason to believe that strict scrutiny applies. The point of the discussion in *Croson*, however, was that strict scrutiny had not been met, and nothing in the opinion indicates that the Court was also stating that the inclusion of Native Americans would not survive rational basis review.



### B. *The Definition of "Native Hawaiian" Is Political, not Racial*

Another possible argument would concede that *Mancari* requires that benefits be given based on a political classification in order for rational basis review to apply, but would not concede that this was limited to tribes. On this basis, it might be contended that the category of Native Hawaiians is a political classification akin to an Indian tribe.

The broadest form of such an argument would be that the definition of Native Hawaiian has no racial or ethnic component, but such an assertion is untenable in light of the definition's reliance on descent from "the races inhabiting the Hawaiian Islands previous to 1778."<sup>143</sup> Moreover, 1778 was not some random year; it conveniently divides the original Polynesian inhabitants from the subsequently arriving groups of variegated ethnicities. A more plausible argument would be that, though there is an undeniable racial element to the definition of Native Hawaiian, the definition is analogous to that upheld in *Mancari* because it adds the nonsuspect political criterion of descent from people who were subjugated and dispossessed. In *Mancari*, the Supreme Court found that the relevant definition was political, even though it was effectively limited to members of a particular ethnic group,<sup>144</sup> because there

---

One final alternative bears mention: The above passages from *Croson* might be construed as indicating merely that there is no special relationship between Native Americans and state or local governments, and holding open the question whether there is a special relationship between Native Americans and the federal government; such a distinction between federal and state authority flows from *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979). See *infra* note 217. If that had been the Court's point, though, it likely would have cited *Yakima Nation* or otherwise given some indication that its skeptical view of benefits for Native Americans applied only to state preferences, and not to federal programs. As it was, the Court's reference to Native Americans does not intimate that the subtleties of *Yakima Nation* were relevant. Thus, although it is possible that the Court assumed that there was a special relationship between the federal government and Native Americans but none with the states, and that it saw no need to articulate this assumption, the more obvious conclusion is simply that the Court believed that the classifications of Native Americans were racial classifications subject to strict scrutiny.

143. HHCA § 201(a)(7); see *supra* notes 65, 96–97 and accompanying text

144. Interestingly, though the BIA regulation upon which *Mancari* relied required both membership in a federally recognized Indian tribe and "one-fourth or more degree Indian blood," see *supra* note 38, the Court's emphasis was on tribal membership, and it is not clear that the Court considered the blood-quantum requirement to be necessary. If the Court truly were to treat all members of recognized Indian tribes as subject to the special relationship, then a tribe that did not require ancestry would also be subject to the special relationship and thus it might not be fair to characterize the special relationship as involving race plus tribal status; the relationship could simply depend on tribal status, with no ethnic requirement. If so, this would further distinguish tribal classifications from the existing classifications of Native Hawaiians, which obviously do turn on ancestry. This argument is speculative, however, because in neither *Mancari* nor its progeny did the Court address the application of the special relationship to someone who was not of Indian ancestry. But cf. *Montoya v. United States*, 180 U.S. 261, 266 (1901) ("By a 'tribe' we understand a body of Indians of the same or similar race . . ."); *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846) (holding that white person could not be treated as member of Indian tribe)

Some commentators have argued that *Rogers* and federal government policies focusing on blood quantum have effectively racialized membership of Indian tribes. See, e.g., Ball, *supra* note 28, at 17 ("The United States has imposed upon Indians its own, alien, definitions of 'tribe,' and it has made race a dominant factor in determining tribal membership."); M. Annette Jaimes, *Federal Indian Identification Policy: A Usurpation of Indigenous Sovereignty in North America*, 16 POL'Y STUD. J. 778 (1988). cf. James Axtell, *The White Indians of Colonial America*, 32 WM. & MARY Q. 55 (discussing some Indian tribes')

was a further limitation to tribal members; those individuals who were racially American Indians but who were not members of a tribe were excluded from the definition.<sup>145</sup> Similarly, one could argue, the definition of "Native Hawaiian" is political because, though effectively limited to members of one ethnic group, it excludes those who share their racial or ethnic characteristics but who do not share their history.<sup>146</sup> Under this reasoning, the definition of Native Hawaiian is "political" under *Mancari*'s typology, rather than racial, and so strict scrutiny is inappropriate.

*Mancari*, however, did not suggest that there were several nonsuspect political classifications that would suffice to eliminate the racial character of a definition, of which tribal membership was one; indeed, it never intimated that there was a category of political classifications that could cleanse a racial classification. The Court was not discussing political classifications in general or in the abstract, but rather in the specific context of characterizing tribal membership. The opinion simply stated that the requirement of tribal membership was political. The Court never suggested that a different political classification in a definition of Native Americans could eliminate the

---

assimilation of Westerners in colonial times). If so, then the federal government's racializing policies not only trampled upon tribal sovereignty and integrity but also may have weakened the argument in defense of the constitutionality of benefits to tribal members by effectively limiting tribal membership to those who were racially "Indian." Cf. *infra* note 145.

This point arguably adds equitable force to the Court's conclusion in *Mancari*; that decision's emphasis on the political status of tribes can be seen as downplaying the very racial element that the government helped to create. For a discussion of a somewhat analogous equitable argument involving the federal government's historical treatment of Native Hawaiians, see *infra* notes 194–200 and accompanying text.

145. Professor David Williams has strongly criticized *Mancari*'s suggestion that the addition of a political classification (tribal membership) to a racial classification (being an American Indian) renders the entire classification political, and not racial. See Williams, *supra* note 42, at 798–807. Williams contends that the definition at issue in *Mancari* is racial, just like other categories defined both by race and a nonsuspect classification, such as left-handed African Americans or Latino government employees. See *id.* at 807. Williams does not actually contend that *Mancari* should be overruled, however, and, more importantly, the Supreme Court has not done so; for purposes of the current constitutional status of Native Hawaiians, *Mancari*'s reasoning still provides the framework.

146. This, in fact, was the argument put forward by Professor Jon Van Dyke (who has served as counsel to OHA) in defense of the constitutionality of OHA. See Van Dyke, *supra* note 19. Professor Van Dyke noted the political/racial distinction but argued that the definition of Native Hawaiian was political:

[T]he United States does not grant any special privileges to or have a trust relationship with Canadian, Mexican, or Guatemalan Indians residing in the United States, even though they are members of the same "race" as American Indians. Similarly, the preference involved in OHA does not extend to native Hawaiians not residing in Hawaii, nor does it apply to other Polynesians in Hawaii, such as Tongans and Samoans, who are members of the same "race" as Hawaiians but who do not fit the "political" classification of being descendants of persons who resided here prior to 1778.

The preferences granted to persons native to areas that now constitute the United States are therefore, *political* in the sense that they arise out of a specific set of political and historical relationships and are not an attempt to elevate one race over another solely for racial reasons. *Id.* at 75–76 (footnotes omitted). Holding aside the questionable characterization of an ancestry-based limitation as political, Van Dyke's analogy fails because, under *Mancari*, not only are Canadian Indians outside the special relationship, but so too are American Indians who are not members of tribes.

definition's racial character, much less that such an alternative political element could create a special relationship and give rise to rational basis review.

Moreover, the argument based on a shared history of subjugation ignores *Mancari*'s explicit distinction between preferences for Indians "as a discrete racial group" and Indians "as members of quasi-sovereign tribal entities."<sup>147</sup> Presumably, every descendant of an American Indian shares a history of subjugation and dispossession (as, arguably, all descendants of pre-1778 Hawaiian inhabitants do), yet the Court did not intimate that this history rendered a classification of all American Indians political, and in fact it indicated otherwise.<sup>148</sup> The key, under *Mancari*, is that only some American Indians are members of tribes, and only legislation limited to them is considered under rational basis review.

One other point bears mention: Even if the presence of a nonsuspect political criterion *could* cleanse a racial classification under *Mancari*, the addition of the element of descent from a particular group of people seems insufficient to transform the definition of Native Hawaiian into a nonsuspect classification. Rather than adding an element that is ordinarily nonsuspect (such as representation by a particular government or voluntary membership in an organization), the definition of Native Hawaiian adds an element that is ordinarily suspect: ancestry.<sup>149</sup> It is hard to understand how the introduction of a requirement of descent renders the definition of Native Hawaiian nonsuspect, any more than introducing a religious or alienage criterion would.<sup>150</sup> Simply stated, it is not clear that there is any distinction, for purposes of the level of scrutiny, between a hypothetical classification of "the races who . . ." and the actual classification of Native Hawaiians based on having the "blood of the races . . ."<sup>151</sup>

147. *Mancari*, 417 U.S. at 554; see also *id.* at 553 & n.24.

148. See *supra* notes 121, 130-31 and accompanying text.

149. See *Oyama v. California*, 332 U.S. 633, 646 (1948); *Hernandez v. Texas*, 347 U.S. 475, 479 (1954); see also *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 n.5 (1987).

150. The Court reached a similar conclusion in *Hoohuli v. Ariyoshi*, 631 F. Supp. 1153 (D. Haw. 1986). In that case, "native Hawaiians" (that is, those with 50% or more native blood) challenged the inclusion of "Hawaiians" (those with any native blood) in the statute creating the Office of Hawaiian Affairs. See *id.* at 1154-56; see also HAW. CONST. art. XII, § 6 (providing that OHA shall exercise its authority to benefit "native Hawaiians and Hawaiians"); HAW. REV. STAT. ANN. § 10-2 (Michie 1995) (defining "native Hawaiian" and "Hawaiian" for purposes of OHA). As the district court repeatedly noted, neither party challenged the constitutionality of OHA or of preferences for Native Hawaiians *per se*; rather, their dispute was whether the benefits should be given only to "native Hawaiians" or could also include "Hawaiians." See *Hoohuli*, 631 F. Supp. at 1159. The plaintiffs argued that the definition of "Hawaiian" was racial, but that the definition of "native Hawaiian" was not. The court noted that, in furtherance of this argument, the plaintiffs

asserted that although the definition of "native Hawaiian" also [i.e., like the definition of "Hawaiian"] used the term "races," it was *not* subject to strict scrutiny because it was in fact based on aboriginal lineage and not race. This court finds that if there is a distinction, it is without a difference.

*Id.* at 1159 n.23.

151. HHCA § 201(a)(7). The definition of "Native Hawaiian," then, would stand on no different footing than one that applied to African Americans, but only those descended from slaves; or one that

### C. *Native Hawaiians Are an Indian Tribe or Tribes*

Perhaps the most obvious argument is simply that Native Hawaiians constitute a tribe or tribes and thus are squarely within the core holding of *Mancari*, so the failure of the arguments delineated above is of no consequence.<sup>152</sup> This proposition may seem attractive at first glance, but it appears to be untenable.

One difficulty is that it is not compatible with the language of statutes singling out Native Hawaiians, which refer simply to Native Hawaiians (rather than to members of the Native Hawaiian tribe or tribe-like group).<sup>153</sup> All of the other arguments discussed in this Article are compatible with the statutory language, in that they assert either that the breadth of the definition of Native Hawaiian is unproblematic because *Mancari* does not limit rational basis

applied to only those Chinese who descended from people who arrived as underpaid laborers. In such a circumstance, it seems highly unlikely that a court would find that the addition of a nonracial criterion to an explicitly racial definition would thereby cure the definition of its racial character and render the entire classification nonsuspect for equal protection purposes. The limitation might help to demonstrate that the group was neither under- nor overinclusive and that the legislation, therefore, was narrowly tailored; but that would apply, of course, only after a court had determined the appropriate level of scrutiny and was applying that scrutiny to the legislation. Many of the classic cases of suspect classifications have involved definitions that could be construed as having political elements as well (e.g., African Americans who certified that they suffered economic disadvantages in *Adarand*), and yet the Supreme Court had no difficulty concluding that, in light of the limitation to members of a particular race, further limitations within that race did not render the classification nonsuspect. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2103 (1995); see also *id.* at 2121 n.3 (Stevens, J., dissenting) (noting that government had—unsuccessfully—attempted to avoid strict scrutiny in *Adarand* by relying on fact that not all members of preferred minority groups were eligible for statutory preference); *Korematsu v. United States*, 323 U.S. 214 (1944) (treating classification of persons of Japanese descent who resided on West Coast as racial); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (holding “political” redefinition of municipal boundaries with clear racial intent is not immune from judicial review).

Admittedly, there is one significant Supreme Court case (other than *Mancari*) in which the Court has found that a suspect classification could be rendered nonsuspect by the addition of a nonpolitical criterion: *Geduldig v. Aiello*, 417 U.S. 484 (1974). In that case (which was, perhaps not coincidentally, decided the same day as *Mancari*), the Court found that pregnancy discrimination is not gender discrimination because “[t]he program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.” *Id.* at 496–97 n.20. Many commentators have severely criticized the suggestion that the classification was not suspect. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-29, at 1578 (2d ed. 1988) (*Geduldig*’s reasoning “approach[es] the farcical”); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983 (1984) (“Criticizing *Geduldig* has since become a cottage industry.”); see also Newton, *supra* note 28, at 285 (comparing *Mancari* and *Geduldig* and criticizing both cases: “The premise of *Mancari*’s tribal status argument (as well as the premise of *Geduldig*’s pregnancy status argument) is faulty and should not stand unchallenged.”). More importantly, the Court has never applied in any other situation *Geduldig*’s suggestion that a suspect classification could be rendered nonsuspect by the addition of a separate, nonsuspect criterion. This, combined with the Court’s vigilance in treating statutes that contain a racial element as suspect—even if other elements also are present—indicates that the Court would apply strict scrutiny to a racial classification that also had nonsuspect criteria attached.

152. The question whether a group is an “Indian Tribe[.]” for constitutional purposes (irrespective of whether it has been formally recognized by the federal government) is sometimes described as an inquiry as to whether a group is an ethnological or legal tribe (as opposed to a recognized one). See, e.g., Eric Smith & Mary Kancewick, *The Tribal Status of Alaska Natives*, 61 U. COLO. L. REV. 455, 471–82 (1990); L.R. Weatherhead, *What is an “Indian Tribe”?—The Question of Tribal Existence*, 8 AM. INDIAN L. REV. 1, 8–9 (1980).

153. See *supra* notes 96–97.

review to tribes (Sections A and B above); or that Native Hawaiians, though not technically constituting a tribe, should be construed as constituting a tribe *en masse* because of their history or treatment by Congress (Sections D and E below). This assertion, however, is different. It concedes that the special relationship is limited to tribes and that strict scrutiny otherwise applies, and it does not seek to have the entire population of Native Hawaiians treated as if they were a tribe because of their history; rather, it contends that they currently are a tribe.

The problem is that, assuming that Native Hawaiians do currently constitute a tribe, there would still be constitutional problems with the current statutory framework; the statutes benefit Native Hawaiians (defined by ancestry), not the Native Hawaiian tribe or members of the Native Hawaiian tribe.<sup>154</sup> There are not even any regulations that could be construed as defining Native Hawaiians as members of the Native Hawaiian tribe, as was the case in *Mancari*. In other words, this argument fails in the first instance because its success in bringing Native Hawaiians within the special relationship depends on a mode of distribution of benefits—namely, through tribes—that does not currently exist.<sup>155</sup>

---

154. One seeming counterargument to this point is that the definition of Native Hawaiian is no more incompatible with Native Hawaiians constituting a tribe or tribes than a statute simply benefiting "the Navajo" would be; the statute benefiting "the Navajo" would be interpreted as applying only to members of the Navajo tribe, just as statutes benefiting Native Hawaiians would be limited to members of the Native Hawaiian tribe or tribes. The problem with this argument is that the programs for Native Hawaiians do not refer simply to "Native Hawaiians," without more: They define "Native Hawaiians" as the descendants of the races who occupied Hawaii before 1778. See *supra* notes 96–97. Thus the definitions are not analogous to one referring to "the Navajo."

Moreover, a truly analogous statute for the Navajo would appear to be a racial, not a political, classification under *Mancari*. If our hypothetical statute defined "the Navajo" as "the descendants of the members of the Navajo tribe before their contact with Westerners," it would be difficult to characterize it as a political classification. Some members of the benefited class might not have any connection to the current Navajo nation. The only required commonality would be in their ancestry.

It might seem possible to avoid the conclusion that this would be a racial classification by arguing that a tribal entity could define its members as all descendants of the original members and no one else, and could refuse to recognize renunciations. Under these circumstances, the category of all descendants would be coterminous with the membership of the tribe, arguably rendering the definition political. The hypothetical "tribe" so defined, however, would not be a political entity at all, so it is hard to understand how it could be fairly characterized as a political classification. As was noted above, the basis of *Mancari*'s distinction between racial and tribal classifications was that the latter were grounded in tribes' semi-sovereign status and their existence as cognizable entities. See *supra* notes 38–42, 117–18 and accompanying text. If a tribe were defined to include all Indians of a certain lineage, without any suggestion of any other connection, it would presumably run afoul of this distinction.

155. It bears mentioning that a potential difficulty arises from the fact that statutes for Native Hawaiians utilize two different definitions of Native Hawaiians: Some apply to all descendants of pre-1778 inhabitants, and others are limited to those with 50% or more native blood. This raises a possible problem for the argument that Native Hawaiians currently constitute a tribe, because it means that either the former set of statutes are overinclusive or the latter set are underinclusive. That is, if the Native Hawaiian tribe includes only those with 50% or more Native blood, then programs (like OHA) that benefit all descendants (not merely those with a 50% blood quantum) would still be racial, rather than political, because they would not be limited to members of the tribe; and, if the Native Hawaiian tribe includes all descendants, the programs limited to those with 50% or more native blood (like the HHCA) would have grafted a racial classification onto the political classification of membership in a tribe. In such a case, the addition of the 50% threshold would undercut the political argument based on tribal status. The existence (and seriousness)

In addition to this problem of statutory incompatibility, there is a practical problem with the argument that Native Hawaiians constitute one large Indian tribe: Native Hawaiians are not organized into any entity that can reasonably be called a tribe.<sup>156</sup> This raises the initial question of what attributes an Indian group must possess in order to qualify as a tribe.<sup>157</sup> One possible

---

of this problem is not clear, however, for a simple reason: Though the logic of *Mancari* would seem to suggest that assisting only the segment of a tribe with a particular blood quantum would constitute treating that segment as a racial group, not as a tribal (or political) one, the regulation upon which the Court relied gave a hiring preference only to those people who were members of federally recognized Indian tribes and had 25% Indian blood. See *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974). The Court in *Mancari* ignored the second part of this requirement, and it has never directly addressed the constitutionality of a blood quantum minimum in addition to a requirement of membership in a federally recognized tribe. *Mancari*'s silence may suggest, however, that it concluded that the addition of a blood quantum requirement does not raise constitutional concerns.

156. It should be noted that the one other article that directly focused on the question of the tribal status of Native Hawaiians reached a different conclusion. See Houghton, *supra* note 19. In that piece, the author, after noting that "Congress may not apply its powers over Indians to a particular group or community by arbitrarily calling them a tribe," applied five "considerations" from Felix Cohen's *Handbook of Federal Indian Law* in arguing that Native Hawaiians were entitled to tribal status:

"(1) whether the group has had treaty relations with the United States; (2) whether the group has been denominated a tribe by act of Congress or Executive order; (3) whether the group has been treated as having collective rights in tribal lands or funds, even though not expressly denominated a tribe; (4) whether the group has been treated as a tribe or band by other Indian tribes; and (5) whether the group has exercised political authority over its members, through a tribal council or other governmental forms."

Houghton, *supra* note 19, at 13-14 (quoting COHEN, *supra* note 41, at 271).

Houghton's analysis suffers from several flaws, however (in addition to the more general problems with this line of argument discussed in the text). First, Cohen's book did not suggest that this list of five considerations determined whether a group was a tribe or not for constitutional purposes. Rather, it merely noted that the BIA and the Department of the Interior had utilized these criteria, among others, in determining whether or not a given group was a "tribe" for purposes of the IRA, 25 U.S.C. § 476 (1994). See COHEN, *supra* note 41, at 270-71. Cohen's five criteria are particularly inapposite in light of newer BIA regulations—which include many more than the five criteria—that supersede the considerations listed in Cohen's book. See *infra* notes 158-60 and accompanying text. Second, Native Hawaiians do not appear to meet these five criteria. The fifth requirement is that the group "has exercised political authority over its members." Apparently, this is not merely a requirement that the group exercised such authority in the past, but also that it continue to do so (because otherwise the criteria would include former tribes). Cohen himself indicated as much in his opinions for the Department of Interior on recognition of tribal groups. For instance, a 1938 opinion rejected the Oklahoma Miami and Peoria Indians' application for tribal status, stating:

It is not enough that the ethnographic history of the two groups shows them in the past to have been distinct and well-recognized tribes or bands. A particular tribe or band may well pass out of existence as such in the course of time. . . . There must be a currently existing group distinct and functioning as a group . . . .

1 OPINIONS OF THE SOLICITOR, *supra* note 115, at 864 (Opinion of Dec. 13, 1938); see also *id.* at 725 (Opinion of Feb. 8, 1937) ("While the St. Croix Indians . . . might have been recognized as a separate band at the time of the 1854 treaty, they now present no characteristics entitling them to recognition as a band, particularly as there exists no form of band organization."). The problem, as will be discussed below, is that there is no Native Hawaiian entity that serves this function. See *infra* notes 168-73 and accompanying text.

157. Some commentators have suggested that such a question is problematic, both because indigenous groups should define themselves (rather than having a definition imposed from the outside by others) and because the organizational arrangements of indigenous peoples are too multifarious to admit of a single, useful definition. See Gerald Torres & Kathryn Milun, *Translating Yonnonndio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 655-59 (discussing importance of self-definition); Weatherhead, *supra* note 152, at 5-6 (discussing multiplicity of socio-political arrangements). The problem here is that the Indian Commerce Clause of the Constitution refers to "Indian Tribes," and the Court has treated that provision as empowering Congress to take action with respect to "Indian Tribes" that, if taken

answer is the criteria laid out in the BIA regulations on recognition of Indian tribes.<sup>158</sup> These criteria set a fairly high threshold, including requirements that the group "has maintained political influence or authority over its members as an autonomous entity from historical times until the present," and that "[a] predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present."<sup>159</sup> It may be objected, however, that these criteria define the groups that the federal government is willing to recognize, not necessarily those that it has the authority to recognize. This point has some merit; it is not clear that the Supreme Court, faced with the question of what can constitute a tribe, would rely on the current BIA regulations.<sup>160</sup> It is also possible that the Court would look to the definition of "tribe" it propounded in *Montoya v. United States*<sup>161</sup>—the most-cited and most-quoted definition of "tribe," and the only one the Court has put forward in the last hundred years.<sup>162</sup> *Montoya* stated that "[b]y a 'tribe' we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."<sup>163</sup> It should be noted that the Court did not state that these were the constitutional minima for an Indian tribe; it has never confronted this constitutional question. In

---

for a racial or ethnic group, would be unconstitutional. Under these circumstances, the courts and Congress will need to utilize some definition of "Indian Tribes," as that term is used in the Indian Commerce Clause, to determine whether a given law violates equal protection. Whether that definition allows for one or many kinds of tribes, and whether it is proposed by indigenous groups themselves or by the federal government, the definition itself must exist in order to allow for the assessment of programs under present case law (specifically, *Mancari* and *Adarand*).

158. See 25 C.F.R. § 83 (1996).

159. *Id.* §§ 83.7(b)–(c). These criteria do not, by their terms, apply to Native Hawaiians, because their application is limited to "American Indian groups indigenous to the continental United States" *Id.* § 83.3(a).

160. It is worth noting, though, that the Ninth Circuit, in determining whether a Native Hawaiian group was an "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior," 28 U.S.C. § 1362 (1994), applied the criteria from the BIA regulations. See *Price v. Hawaii*, 764 F.2d 623, 627 (9th Cir. 1985). Similarly, the Second Circuit decided to defer to the BIA's ongoing recognition process, rather than attempt to determine on its own whether a putative tribe should be treated as an Indian tribe. See *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 60 (2d Cir. 1994) ("[T]he creation in 1978 of the acknowledgment process currently set forth in 25 C.F.R. Part 83—a comprehensive set of regulations, the BIA's experience and expertise in implementing these regulations, and the flexibility of the procedures weigh heavily in favor of a court's giving deference to the BIA.").

161. 180 U.S. 261, 266 (1901).

162. See, e.g., Smith & Kancewick, *supra* note 152, at 473–74 ("[I]n *Montoya* the Supreme Court established a practical legal definition for the ethnological 'tribe' . . . . Thus, insofar as federal Indian law is concerned, the existence of an historical—an ethnological—tribe should be determined by reference to the *Montoya* definition."); see also *infra* notes 166–68 (citing cases and articles that rely on *Montoya*).

The main pre-*Montoya* case on the criteria for status as a tribe was *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188 (1876), which adopted a similar definition. See *infra* note 165.

163. *Montoya*, 180 U.S. at 266; see also *Forty-Three Gallons of Whiskey*, 93 U.S. at 195 ("As long as [the Red Lake and Pembina Chippewa] Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the government, Congress has the power to say with whom, and on what terms, they shall deal . . . .").

*Montoya* the Court was construing the word "tribe" from a statute,<sup>164</sup> so the Court's definition may have been merely descriptive of current tribes (or current conceptions of tribes), rather than prescriptive, or the statutory definition may otherwise have differed from the constitutional one. On the other hand, there was no suggestion that it was relying on congressional intent, or that it was backward-looking; the Court appeared to be propounding a definition that would determine, in future cases, whether a group could be called a "tribe" or not. Although it did not suggest that the statutory definition was identical to the constitutional one, it gave no reason to suppose that the two would differ.<sup>165</sup> Furthermore, the Court has utilized this definition in interpreting other statutes containing general terms such as "any tribe of Indians," and has treated *Montoya* as providing the prevailing definition of "tribe."<sup>166</sup> Finally, both courts and commentators have regarded *Montoya*'s definition as setting forth the minima for tribes; that is, they have utilized this definition in addressing whether a group qualifies as a tribe.<sup>167</sup>

Exact determination of the BIA regulations' and *Montoya*'s status is unnecessary, however, because in this case there is little reason to suppose that Native Hawaiians would satisfy any definition of "Indian Tribe[]" that the Court would likely adopt. As the BIA regulations, *Montoya*, and perhaps the word itself suggest, an apparent *sine qua non* of a tribe is that it be a coherent entity composed of members who have accepted its authority.<sup>168</sup> In fact, in

---

164. The relevant language (which was part of the Indian Depredation Act) referred to property "taken or destroyed by Indians belonging to any band, tribe or nation in amity with the United States." *Montoya*, 180 U.S. at 264 (quoting Indian Depredation Act, ch. 538, 26 Stat. 851 (1891)). The Court first defined "nation," "tribe," and "band" and then determined whether the group in question was "in amity with the United States." *Id.* at 265-70.

165. Moreover, the Court in *Forty-Three Gallons of Whiskey* did address the issue of Congress's constitutional power to deal with Indian tribes, and it treated "an existing tribal organization, recognized by the political department of the government" as a requirement. 93 U.S. at 195.

166. See, e.g., *United States v. Candelaria*, 271 U.S. 432, 442 (1926) (adopting *Montoya*'s language as the definition to the term "any tribe of Indians" in the Indian Nonintercourse Act); *United States v. Chavez*, 290 U.S. 357, 364 (1933) (using *Montoya*'s language in defining "Indian country").

167. For instance, in the leading case involving an American Indian group seeking to be treated as a tribe, the district judge treated *Montoya* as delineating the applicable requirements, and the court of appeals affirmed that decision. See *Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899, 902-03 (D. Mass. 1977); see also *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 943 (D. Mass. 1978), *aff'd sub nom.* *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979); *Native Village of Tyonek v. Puckett*, 957 F.2d 631, 635 (9th Cir. 1992); *Catawba Indian Tribe v. South Carolina*, 718 F.2d 1291, 1298 (4th Cir. 1983), *aff'd*, 740 F.2d 305 (4th Cir. 1984) (en banc), *rev'd on other grounds*, 476 U.S. 498 (1986); *Golden Hill Pausgussett Tribe v. Weicker*, 39 F.3d 51, 59 (2d Cir. 1994); *Joint Tribal Council v. Morton*, 528 F.2d 370, 377 n.8 (1st Cir. 1975); *Smith & Kancewick*, *supra* note 152, at 483-96 (citing *Montoya* as authoritative); *Native Village of Venetie I.R.A. Council v. Alaska*, Nos. F86-0075 CIV (HRH), F87-0051 CIV (HRH), 1994 WL 730893, at \*4, \*12 (D. Alaska 1994); William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and* 25 C.F.R. § 83, 17 AM. INDIAN L. REV. 37, 44-45 (1992) (noting that *Montoya* has formed the judicial test for courts that have attempted to determine tribal existence); cf. *Torres & Milun*, *supra* note 157, at 634-36 (analyzing critically district judge's reliance on *Montoya* in *Mashpee Tribe v. Town of Mashpee*).

168. See *Weatherhead*, *supra* note 152, at 22, 23-30 (noting consensus among courts, commentators, and BIA that group seeking status as tribe must, inter alia, "form[] a separate community" and must "have a tribal organization with authority over its members"); *Sedolvia Native Ass'n, Inc. v. Lujan*, 904 F.2d 1335, 1350-51 (9th Cir. 1990) ("Unlike . . . Native Alaskan Villages . . . [plaintiff Native village



recent years the Court has placed great emphasis on the consent of tribal members, positing members' consent as the basis of tribes' authority.<sup>169</sup> If the putative members of the group have not agreed to be governed under a tribal political structure, it is hard to imagine how the group could be called a tribe in any meaningful sense of the word.<sup>170</sup> After all, any private organization or individual can claim to govern all Native Hawaiians—or all American Indians—but the relevant question is whether all Native Hawaiians have accepted such governance.<sup>171</sup> The problem for Native Hawaiians is that there appears to be no Native Hawaiian group that meets this most basic criterion.<sup>172</sup> There are many groups that claim to represent all Native

---

corporation] is not a governmental unit with a local governing board . . . . Because [plaintiff] is not a governing body, it does not meet one of the basic criteria of an Indian tribe." (citing *Montoya*)); *Golden Hill Paugussett Tribe*, 39 F.3d at 59 ("The *Montoya/Candelaria* definition and the BIA criteria both have anthropological, political, geographical and cultural bases and require, at a minimum, a community with a political structure."); *United States v. Washington*, 641 F.2d 1368, 1372-73 (9th Cir. 1981) (stating that group "must have maintained an organized tribal structure" in order to exercise treaty rights and concluding that appellant groups were not tribes because "the[i]r governments have not controlled the lives of the members"); 1 OPINIONS OF THE SOLICITOR, *supra* note 115, at 864 (Opinion of Dec. 13, 1938) ("There must be a currently existing group distinct and functioning as a group . . ."); *id.* at 725 (Opinion of Feb. 8, 1937) (rejecting St. Croix Chippewa's application for recognition as tribe because "there exists no form of band organization"); *see also* *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (upholding congressional delegation to Indian tribes because "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory")

169. Thus, in *Duro v. Reina*, 495 U.S. 676 (1990), the Court, in holding that the Salt River Pima-Maricopa Indians did not have criminal jurisdiction over a nonmember Indian who lived on their reservation, relied in part on "the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent." *Id.* at 694, *see also id.* (rejecting "an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system"), *id.* at 693 (stating that tribe's "authority comes from the consent of its members"). Of particular relevance for this Article, the Court stated flatly that "[p]etitioner's general status as an Indian says little about his consent to the exercise of authority over him by a particular tribe." *Id.* at 695. *See generally* L. Scott Gould, *The Consent Paradigm Tribal Sovereignty at the Millenium*, 96 COLUM. L. REV. 809 (1996) (discussing Supreme Court's emphasis on consent).

170. There is a robust debate among political philosophers over the individual consent necessary to render a government legitimate. The position taken in this Article is not a statement of adherence to a particular vision of the state, but rather is a judgment about what the Supreme Court would (and perhaps should) consider in the particular context of unrecognized groups seeking status as recognized Indian tribes.

171. Significantly, it is not even clear what percentage of Native Hawaiians consider themselves to be Native Hawaiians, much less members of a Native Hawaiian tribe. The 1990 U.S. Census asked respondents to identify their ethnicity, and one of the options was "Hawaiian." 12.5% of respondents so identified themselves. The State of Hawaii conducted its own tabulation of the population in 1990, however, and it relied not on self-identification but on the ethnic background of the respondents' parents. It found that 19% of the population was Native Hawaiian (or, in the parlance of the survey, "Hawaiian"). *See* OFFICE OF HAWAIIAN AFFAIRS, *supra* note 54, at 10. This means that about one-third of those with native blood did not (and perhaps do not) identify themselves as Native Hawaiians. *See also id.* at 9 ("While their ancestors once may have been unified politically, religiously, socially, and culturally, contemporary [Native] Hawaiians are highly differentiated in religion, education, occupation, politics, and even in their claims to Hawaiian identity." (quoting George S. Kanahale, *The New Hawaiians*, 29 SOC. PROCESS IN HAW. 21, 21 (1982))); OFFICE OF HAWAIIAN AFFAIRS, *supra* note 54, at 24 (summarizing the Native Hawaiian population as "a rapidly growing population, predominantly young in composition, racially mixed, gender-balanced, urbanite, unattached, and slowly moving toward economic self-sufficiency")

172. As the Hawaiian Sovereignty Election Council has stated

Some Hawaiian organizations have developed constitutions, position papers, and master plans for sovereignty or independence. In essence these organizations are political parties, each earnestly advancing their own platforms. These organizations are self-appointed. They have not

Hawaiians, but none that claims that all Native Hawaiians have assented to its representation.<sup>173</sup> The lack of such universal membership defeats the

---

received the consent of the Hawaiian people, as a whole, to be their government.

HAWAIIAN SOVEREIGNTY ELECTIONS COUNCIL, REPORT TO THE LEGISLATURE 13 (1995); *see also* Carey Goldberg, *Native Hawaiians Vote in Ethnic Referendum*, N.Y. TIMES, July 23, 1996, at A10 (noting that there are now scores of Native Hawaiian groups, and that "Native Hawaiian groups remain divided on what sovereignty should mean, and no unifying native Hawaiian leaders have emerged").

173. Even the Native Hawaiian groups with the largest memberships claim no more than a fraction of Native Hawaiians among their members. *See, e.g.*, Peter Rosegg, *Hawaiians Considering 4 Types of Sovereignty*, HONOLULU ADVERTISER, Oct. 2, 1994, at B4 (identifying Ka Lahui Hawaii and State Council of Hawaiian Homestead Associations as two biggest groups attempting to constitute Native Hawaiian tribal entity entitled to federal recognition; noting that Ka Lahui claims 24,000 members and State Council 30,000 members); Mahealani Kamau'u & H.K. Bruss Keppeler, *Sovereignty: What Will It Look Like?*, HONOLULU ADVERTISER, Oct. 24, 1993, at B1 (identifying as two biggest groups attempting to set up their own governing structure Ka Lahui Hawaii, with 18,000 members, or approximately seven percent of total Native Hawaiian populace, and State Council of Hawaiian Homestead Associations, with 30,000 members); *Anniversary Stirs Hawaii Sovereignty Movement*, N.Y. TIMES, Jan. 18, 1993, at A15 (identifying Ka Lahui Hawaii as "[t]he largest of the pro-sovereignty organizations," and as claiming 14,000 members); Kekuni Blaisdell, *'Aloha 'Aina' at Heart of Sovereignty*, HONOLULU ADVERTISER, Mar. 22, 1994, at B1 (noting that Ka Lahui has more than 20,000 members, both Native Hawaiians and non-Native Hawaiians, and that 'Ohana Council claims 7,000 members); Goldberg, *supra* note 172, at A10 (noting that many Native Hawaiian groups range from family groups to Ka Lahui Hawaii, which claims 21,000 members); Stu Glauberman, *Third Hawaiian Group Enters Self-Determination Fight*, HONOLULU ADVERTISER, July 25, 1989, at A3 (identifying Office of Hawaiian Affairs and Ka Lahui Hawaii as two main groups fighting for Native Hawaiian self-determination, and stating that new third group, State Council of Hawaiian Homestead Associations, includes association presidents who represent about 27,000 people; identifying Hou Hawaiians as much smaller group); Angelo Ragaza, *Trouble in Paradise*, ETHNIC NEWSWATCH, Jan. 31, 1996, at 48 (noting that Nation of Hawaii claims 10,000 members, and that Ka Lahui Hawaii claims 20,000, out of estimated total Native Hawaiian population of at least 200,000); *Hawaii's Search for Sovereignty*, CHRISTIAN SCI. MONITOR, Oct. 17, 1994, at 9 (noting that State Council of Hawaiian Homestead Associations claims 30,000 members); Stu Glauberman, *Who's Who in Quest for Sovereignty Here*, HONOLULU ADVERTISER, June 13, 1992, at A2 (stating that Ka Lahui has had 12,000 enrolled members since 1987); Burl Burlingame, *Dennis 'Bumpy' Kanehele: His Actions Turned Sovereignty into More than Just a Concept*, HONOLULU STAR-BULLETIN, Jan. 2, 1995, at A7 (noting that 'Ohana Council changed name to "The Provisional Government of the Independent Nation State of Hawaii," and identifying it as "a vague confederation of approximately 7,000 sovereignty boosters"); Amicus Brief for Hou Hawaiians at 2, *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (No. 83-141) ("The Hou Hawaiians was founded in 1975 and has approximately 300 members."); Appellants' Supplemental Memorandum at 10, *Price v. Hawaii*, 764 F.2d 623 (9th Cir. 1985) (No. 84-2444) ("[T]he Hou have approximately 300 members.").

The existence of so many groups reflects divisions within the Native Hawaiian community over whether there should be a Native Hawaiian governmental entity, and, if so, what form it should take. *See* Pat Omandam, *No Consensus on Sovereignty: Too Much Infighting in Hawaiian Community, 92 Percent Say*, HONOLULU STAR-BULLETIN, Aug. 25, 1995, at 8 (discussing polls showing absence of consensus among Native Hawaiians); Christy Hoppe, *Divided Destiny: Despite Factions, Many Hawaiians Support Native Rule*, DALLAS MORNING NEWS, Sept. 18, 1995, at 1A (noting disputes among sovereignty groups); Ragaza, *supra*, at 48 (noting that sovereignty groups' inability to agree on course of action has weakened their credibility); Kamau'u & Keppeler, *supra*, at B1 (noting different visions of Native Hawaiians' future, ranging from formation of independent nation to staying with status quo); Alan Matsuoka, *Unity May Be the Key to Turning the Sovereignty Dream into Reality*, HONOLULU STAR-BULLETIN, Aug. 25, 1995, at A1 (noting different approaches).

Differences also arose over the advisability of the recent Native Hawaiian vote, with Ka Lahui, among other groups, bitterly criticizing the vote as a state attempt to coopt the sovereignty movement. *See* Shane Pale et al., *The Ka Lahui Hawai'i Rebuttal to HSEC* (visited Oct. 31, 1996) <<http://kalahui.org/hsec10.html>> [hereinafter *Ka Lahui Hawai'i Rebuttal*] (containing Ka Lahui's criticisms of Native Hawaiian Vote, Hawaiian Sovereignty Election Council's (HSEC) responses, and Ka Lahui's rebuttal to HSEC's responses); Blaisdell, *supra*, at B1 (noting opposition to government commission planning Native Hawaiian vote); Mahealani Kamauu, *Ka Lahui's Rancor Hurts Sovereignty Movement*, HONOLULU STAR-BULLETIN, May 1, 1995, at A11 (criticizing tactics used by Ka Lahui in opposing Native Hawaiian vote).

proposition that all Native Hawaiians are members of a tribe-like organization; after all, it seems impossible to call a group a tribe if it can assert only that it works on behalf of all Native Hawaiians, with no affirmative act on the Native Hawaiians' part.

It might be contended that the Office of Hawaiian Affairs and the Hawaiian Homes Commission serve this function.<sup>174</sup> Both entities appear to have been designed, at least in part, to further the interests of Native Hawaiians.<sup>175</sup> In addition, OHA's governing council is chosen by an electorate that includes all Hawaiians of native descent (and only such Hawaiians).<sup>176</sup> Thus OHA (and perhaps the HHC) can claim to represent all Native Hawaiians.

This reasoning, however, does not indicate that either OHA or the HHC can meaningfully be called a tribe. OHA and the HHC were created by the government and operate as governmental organizations. Their structure and functions have not been determined by Native Hawaiians, acting autonomously. OHA and the HHC are simply entities, created by a government, that are designed to assist a group of Native Americans—just like the BIA; they are no more tribes than the BIA is.<sup>177</sup> The fact that OHA has a board that is elected by Native Hawaiians does not change the fundamental fact that its purposes and the means of effectuating them are determined by the state government.<sup>178</sup> In addition, OHA and the HHC may assert that they represent

---

174. One commentator has so suggested. See Houghton, *supra* note 19, at 45–47 (asserting that Native Hawaiians exercise self-government through OHA and HHC).

175. The purposes of OHA are stated in statutes, and the first two of them are bettering the conditions of Native Hawaiians and Hawaiians (the latter encompassing the former) See HAW REV STAT ANN § 10-3(1)–(2) (Michie 1995). There is no statement of purpose in the HHCA, and the federal government has declined to approve the statement of purpose passed by the Hawaii legislature See *supra* note 67. The purpose suggested by the HHCA's legislative history was improving the conditions of landless Native Hawaiians. See, e.g., 1920 Hearings, *supra* note 63, at 129–31 (statement of Franklin Lane, Secretary of Interior). As was noted above, however, commentators have argued that the real purpose was to aid Western sugar interests and/or to prevent Asian homesteading See *supra* note 63.

176. As was noted above, OHA's electorate—and its class of beneficiaries—includes all Hawaiians who are descended from pre-1778 inhabitants, not just those whose native blood quantum is 50% or greater. See *supra* notes 71–78 and accompanying text.

Also, all the members of the Board of Trustees of OHA “shall be Hawaiians,” HAW CONST art. XII, § 5, (i.e., “any descendant of the aboriginal peoples inhabiting the Hawaiian Islands” in 1778, HAW REV STAT. ANN. § 10-2 (Michie 1995)), and four of the nine members of the HHC “shall be descendants of not less than one-fourth part of the blood of the races inhabiting the Hawaiian islands previous to 1778,” HHCA § 202(a).

177. It would be a clear case of bootstrapping for the federal government to designate the BIA as a semiautonomous entity, to allow all “Indians,” defined racially, to vote for the board of the BIA, and then to assert that the government had thereby brought all those Indians within the special relationship; it would also circumvent the limitations on recognition suggested by *United States v Sandoval*, 231 U.S. 28, 46 (1913), see *infra* notes 213–15 and accompanying text, and the tribe/race distinction of *Mancari*. That is, if the creation of OHA were sufficient to constitute a tribe, then there would be no limitation on a state government, or the federal government, recognizing all of the Native Americans within its boundaries and thereby rendering *Sandoval*'s and *Mancari*'s limitations meaningless.

178. It should also be noted that it is not at all clear that the creation of OHA was constitutional in the first place, as it was (and is) an organization designed solely to benefit a group based on ethnicity See *infra* notes 217, 242 and accompanying text. It would, of course, be circular reasoning to argue that Native Hawaiians are a tribe because of OHA, and that OHA is constitutional because its beneficiaries are

all Native Hawaiians, but, as was noted above, such assertions of authority are not sufficient to confer tribal status on an entity; and the mere fact that all Native Hawaiians can vote in OHA elections (and that many do) does not mean that Native Hawaiians have united under OHA's leadership.<sup>179</sup> Finally, the aforementioned blood quantum difference in the class of beneficiaries for OHA and the HHC underscore the absence of a coherent Native Hawaiian group that can constitute a tribe.

One seemingly possible way to avoid the problem of the absence of a Native Hawaiian entity would be to posit a series of Native Hawaiian tribes, rather than one mass tribe.<sup>180</sup> There is reason to doubt, though, whether any Native Hawaiian entity would meet the constitutional minima for an "Indian Tribe[.]" The group that has made the strongest claim is probably the Hou Hawaiians, a self-proclaimed Native Hawaiian tribe that has brought legal challenges asserting certain rights as a tribe against the State of Hawaii. In *Price v. Hawaii*,<sup>181</sup> the Hou attempted to challenge Hawaii's alleged failure to provide for the betterment of Native Hawaiians—defined as those with fifty percent or more native blood—as delineated in the Admission Act of 1959.<sup>182</sup> The Ninth Circuit held that the Hou could not sue as an Indian tribe within the meaning of a jurisdictional statute, because they did not constitute a tribe for purposes of the statute.<sup>183</sup> Although the court did not directly address whether the Hou satisfied the constitutional minima for status as a tribe, it did list several reasons for rejecting the Hou's position, including that the Hou did not demonstrate that it exercised political authority over its members and could not establish derivation from a longstanding historical tribe.<sup>184</sup> Moreover, the court's language about the Hou's connection to a historical tribe intimated that the Hou would not satisfy any definition of a tribe:

Although native Hawaiians *in general* may be able to assert a longstanding aboriginal history, the issue before us is whether the particular subgroup seeking recognition—the Hou Hawaiians—can establish that they are a longstanding aboriginal sovereign rather than

---

members of the tribe.

179. As will be discussed below, it would be a quite different matter if Native Hawaiians created a tribal entity—for example, by Native Hawaiians holding their own elections, creating a governmental body, and defining its power and authority. See *infra* Part V.

180. It should be noted, though, that whether one posits a mass tribe or a series of tribes, the incompatibility with the language of the statutes benefiting Native Hawaiians would remain: in either case, the problem is that the statutes do not provide for distribution through tribes and, in fact, contain no reference to tribal affiliation (and there are not even any regulations tying the programs to tribal membership).

181. 764 F.2d 623 (9th Cir. 1985).

182. See *id.* at 625–26.

183. See *id.* at 627.

184. See *id.* (discussing historical continuity and longstanding tribal political authority); *id.* at 628 (discussing current exercise of political authority).

a recently formed association. To allow any group of persons to “bootstrap” themselves into formal “tribal” status—thereby obtaining the federal economic and legal benefits attendant upon tribal status—simply because they are all members of a larger aboriginal ethnic body would be to ignore the concept of “tribe” as a distinct sovereignty set apart by historical and ethnological boundaries.<sup>185</sup>

In any event, the question whether there are any Native Hawaiian tribes is largely academic, because it seems clear that many Native Hawaiians who are eligible to receive benefits under federal and state programs are not members of the few organizations that could plausibly call themselves tribes.<sup>186</sup> As a result, even if there are Native Hawaiian tribes that could be subject to the special relationship with the federal government, the existing programs that benefit Native Hawaiians would nonetheless exceed the scope of that relationship because they apply to all Native Hawaiians, not merely to those who are members of tribes. In this way, the programs for Native Hawaiians would be analogous to programs (like that at issue in *Adarand*) benefiting all American Indians, defined racially, which would not be within the special relationship and would be subject to strict scrutiny.<sup>187</sup>

D. *The History and Treatment of Native Hawaiians Entitles Them to the Constitutional Status of Indian Tribes*

A different line of reasoning would concede that Native Hawaiians do not constitute a tribe per se but would argue that, in light of their history and treatment, they should be construed to be a tribe for constitutional purposes; put somewhat differently, that because of Native Hawaiians’ experiences—and in particular the similarity between their treatment and that of Indian tribes—Native Hawaiians are entitled to the same constitutional status that Indian tribes have.

1. *The Histories of Native Hawaiians and Indian Tribes Are Similar in Constitutionally Dispositive Ways, so They Should Have the Same Legal Status*

One way of formulating this argument would be to assert that the history and experience of Native Hawaiians and Indian tribes are constitutionally

---

185. *Id.*

186. *See supra* note 173.

187. *See supra* Section III.A. A court could try to save the Native Hawaiian programs by reading the statutes in conjunction with regulations limiting the benefits to members of tribes, as the Supreme Court did in *Mancari*. The obvious problem with such an approach is that no such limiting regulations exist.

analogous, and thus their constitutional status should be the same as well.<sup>188</sup> The argument would be that in every constitutionally relevant respect, the histories of Indian tribes and Native Hawaiians are essentially identical, so that it would be inappropriate for a court to analyze statutes benefiting Indian tribes differently from those benefiting Native Hawaiians.<sup>189</sup>

There are, indeed, similarities between the history of Indian tribes and that of Native Hawaiians. The federal government signed treaties with Indian tribes, frequently dispossessed them of their land, and sometimes subverted their leaders. Similarly, the United States signed treaties with the kingdom of Hawaii, and the actions of Westerners generally—and the United States specifically—arguably had the effect of subverting Hawaiian traditional leaders (in particular, the monarch) and transferring ownership of lands from the monarch to the United States.<sup>190</sup>

The problem with the suggestion that the history of Native Hawaiians and Indian tribes is similar in constitutionally dispositive ways is that the two groups differ in a crucial respect: American Indians remained in political organizations, but Native Hawaiians did not. That is, unlike American Indian tribes, Native Hawaiians generally did not remain in self-contained groups. The

188. This argument could be construed as implicating equal protection: Indian tribes and Native Hawaiians are similarly situated, so the government (in this case, interestingly, through its courts) would have no rational basis for applying a different constitutional standard to a program benefiting Native Hawaiians than to one benefiting Indian tribes.

189. The findings of many of the federal statutes singling out Native Hawaiians rely heavily on the history of Native Hawaiians, implicitly (and sometimes explicitly) suggesting a similarity to the history of Indian tribes. *See, e.g.*, 20 U.S.C. § 7902 (1994) (containing 12 findings about history of Kingdom of Hawaii and federal government's relations with Hawaii); Joint Resolution of Nov. 22, 1923, Pub. L. No. 103-150, 107 Stat. 1510 (1993).

190. On the significance of the United States's actions, see *infra* Subsection III.D.2. Some commentators have suggested that the Hawaiian Constitution of 1840 and instruments signed by Kamehameha III in 1848 indicate that the Crown and Government lands were owned for the benefit of "the chiefs and people." *See* MELODY KAPILIALOHA MACKENZIE, NATIVE HAWAIIAN RIGHTS HANDBOOK 5-9 (1991); Karen N. Blondin, *A Case for Reparations for Native Hawaiians*, 16 HAW. BAR J. 13, 29 (1981). The meaning of the quoted phrase is not entirely clear: the "people" may not have been limited to Native Hawaiians, and one commentator has noted that "[b]oth Kamehameha III and the legislature used the phrase 'chiefs and people' as legally interchangeable with 'the Hawaiian Government.'" Hanifin, *supra* note 58, at 117. In addition, the 1840 Constitution was repealed in 1852, and the subsequent Hawaiian constitutions (the last of which before the overthrow was the "Bayonet Constitution" of 1887) did not suggest that the Crown or Government lands were for the people. *See id.* at 116. Moreover, the Hawaii Supreme Court held that the 1848 instruments provided for ownership in the Crown and the Government, respectively, not in the people. *See In re Estate of His Majesty Kamehameha IV*, 2 Haw. 715, 725-26 (1964); McPherson, *supra* note 19, at 459. Notwithstanding the foregoing, it may be that Native Hawaiians had certain traditional rights (such as gathering rights) in some Crown and Government lands as of 1893. *Cf.* Public Access Shoreline Hawaii v. Hawai'i County Planning Comm'n, 903 P.2d 1246, 1271-72 (Haw. 1995) (noting possibility of retention of traditional rights by some Native Hawaiians). No court or commentator appears to have alleged, however, that such traditional rights included the right to exclusive use and possession of the land—a right that is essential to any claim of ownership. *See 'Ohana v. United States*, 76 F.3d 280, 282 (9th Cir. 1996). Furthermore, insofar as Native Hawaiians had traditional rights in some of the land, it is not clear that the events of 1893 and 1898 limited them. *Cf. Pele Defense Fund v. Paty*, 837 P.2d 1247, 1272 (Haw. 1992) (noting possibility of survival of traditional gathering rights in ceded lands). Nonetheless, the possibility that the United States's actions eliminated some rights that Native Hawaiians had in Crown and/or Government lands arguably provides some support for the historical analogy to dispossession of Indians' lands.

monarch's role as central authority of Hawaii was supplanted by the United States beginning in 1898.

The federal government made treaties with Indian tribes that generally left the tribal governing structure intact, even though the government limited the tribes' power and land base. In implementing its policy of assimilation of Indians and allotment of native lands during the late nineteenth and early twentieth centuries, the United States frequently weakened tribal structures and undermined tribal leadership (e.g., by subverting traditional leaders who did not support the federal government's plans). These pressures led to changes in Indians' organization—for instance, the deterioration of subtribal political entities—but political organizations continued to exist, including within them almost all Indians.<sup>191</sup> And, though a continuation of the government's assimilation and allotment policies might have eventually destroyed all tribal organizations, Congress's passage of the IRA in 1934 instead led to the strengthening of many tribal organizations by ending allotment and restoring tribal lands and autonomy.<sup>192</sup>

Events worked out differently in Hawaii. The uniting of the Hawaiian islands under Kamehameha in 1810 meant that the replacement of the Hawaiian monarch with the United States government would, *ipso facto*, affect the governing structure of Native Hawaiians. Indeed, there was no domestic government for Native Hawaiians after the American annexation; the Queen had been overthrown, and no indigenous governmental entity replaced her. The new governing structure led by Americans totally displaced the Hawaiian regime, and no remnant of the latter remained.<sup>193</sup> The comparable event for American Indians would have occurred if the United States government had forced the abdication of their tribal leaders and then had taken over the tribes for itself. Instead, in the continental United States the federal government could leave tribes in place and still control the lion's share of the land—because the United States controlled the area around a tribe's territory (i.e., the area outside of the small land areas allotted to a particular tribe). The United States's approach in Hawaii was different: It supplanted the monarch. If the United States government had left the Queen with authority over some of the land of Hawaii (and over Native Hawaiians), her position might have been roughly analogous to that of tribal leaders on the mainland. The Queen lost all her power, however, and the United States assumed control over all the land of Hawaii.

---

191. See CORNELL, *supra* note 41, at 72–84, 101–05 (1988). See generally COHEN, *supra* note 2, at 62–150 (discussing Indian treaties and legislation, and scope of tribal self-government).

192. See IRA, ch. 576, 48 Stat. 984 (1934); 2 FRANCIS P. PRUCHA, *THE GREAT FATHER THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 954–68 (1984).

193. In addition, whereas the IRA had fostered the solidification of tribal structures, the HHCA, in leasing land directly to individuals, provided no incentives for the formation of tribes. For a discussion of the potential significance of this aspect of the HHCA, see *infra* note 276.

2. *Native Hawaiians' and Indian Tribes' Histories Differ Only Because of Federal Government Actions, and Those Actions Should Have No Effect on Native Hawaiians' Constitutional Status*

The discussion above suggests a slightly different formulation of the argument about the similarity of the history of Native Hawaiians and Indian tribes: Native Hawaiians might not currently constitute a tribe, and their history since 1893 might differ from that of Indian tribes, but Native Hawaiians collectively constituted a tribe before 1893, and the federal government's actions in assisting in the destruction of their tribal government (in this case, the Hawaiian kingdom) should not deprive them of their tribal status. That is, Native Hawaiians might argue that the only difference between their experience and that of Indian tribes was that the United States destroyed their government completely; and, they might contend (with considerable equitable force), the United States should not profit from that destruction.<sup>194</sup> The proper remedy, under this theory, would be a finding that a special relationship exists, on the rationale that, where the government ends a tribe's existence, the remaining people should be treated as if they still constituted a functioning entity.

One difficulty with this argument flows from the very characteristic that gives it equitable punch—its focus on the actions of the United States. It seems fair to hold the United States responsible not only for the 1898 annexation that ended the Western-dominated post-1893 Republic, but also, at least in part, for the 1893 overthrow of Queen Lili'uokalani. After all, the landing of troops by the United States Minister appears to have precipitated the Queen's overthrow; and, although the Minister lacked presidential authority, his position, apparent authority, and access to men and materiel are attributable to the United States.<sup>195</sup> The problem is that what was destroyed in 1893 was not a polity

---

194. It also might be argued that failing to recognize a special relationship with Native Hawaiians would create a pernicious incentive system: If the United States completely destroys the governing structures of an indigenous group, it owes nothing to them; but if it leaves some remnants of the government intact, it must accord that government special status and give it benefits.

This argument, however, misses the mark in two ways. First, the issue addressed in this Article is not whether the government "owes" Native Hawaiians anything; the issue is whether, when the government chooses to assist Native Hawaiians (as I believe it should), its actions are subject to strict scrutiny or rational basis review. Concluding that strict scrutiny applies does not mean that the government therefore "owes" nothing to Native Hawaiians. Second, the existence of a special relationship will allow the federal government to single out Native Hawaiians in all kinds of ways, many of which may be detrimental to Native Hawaiians. See *supra* note 30; *infra* text accompanying note 201. The special relationship, then, is not some sort of benefit that is being withheld from Native Hawaiians.

195. In fact, in 1993 Congress passed a joint resolution "apologiz[ing] to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States." Joint Resolution of Nov. 22, 1993, Pub. L. No. 103-150, § 1, 107 Stat. 1510, 1513. The resolution does not actually acknowledge direct federal responsibility for the overthrow, but it can be read as accepting some responsibility for the actions of the United States Minister and other Americans.

The joint resolution consists of a lengthy preamble and a few operative provisions. Though these operative provisions are extremely limited and appear to create no rights, the apology is a part of those



composed solely of descendants of pre-1778 inhabitants of the Hawaiian islands: A majority of the inhabitants were Asians and Westerners who arrived in the nineteenth century. In fact, many of these non-Native Hawaiian inhabitants were citizens of Hawaii, and a good number were born there.<sup>196</sup> The Hawaiian monarch was a Native Hawaiian, but, as was noted above, after 1887 the monarch had very little power; Westerners were in control.<sup>197</sup> By the time the United States Minister landed troops in 1893, Hawaii had already been transformed from an indigenous native government presiding over pre-1778 arrivals to a multiethnic oligarchy presiding over a heterogeneous population.<sup>198</sup> The point is not that a gradual destruction of a native group's sovereignty is different, for special relationship purposes, from a more sudden conquest; rather, the point is simply that most of the steps in the destruction process predated the United States's interference. Thus, it may not be fair to characterize the United States's actions as destroying the sovereignty of a tribe composed only of Native Hawaiians;<sup>199</sup> and, if not, then the argument based on the United States's actions (as opposed to those of Westerners more generally) does not support the recognition of a special relationship with pre-1778 inhabitants. Simply stated, it is not clear that the United States destroyed the equivalent of a Native Hawaiian tribe.<sup>200</sup>

A more fundamental defect in the argument that Native Hawaiians have the same constitutional status as Indian tribes because of the United States's actions is that it misconstrues the constitutional inquiry. The question is whether there is a special relationship between the United States and an "Indian Tribe[]" in the constitutional sense (i.e., under the Indian Commerce Clause). This requires an existing entity comprising the Native Hawaiian

---

operative provisions (not just the preamble); as a result, it arguably provides support for the proposition that the United States bears some responsibility for the 1893 overthrow.

196. See *supra* text accompanying note 54.

197. In fact, as a major treatise notes, "[b]y the time of annexation, Native Hawaiians had been deprived of their original sovereignty for many years, [so] annexation did not radically alter the condition of their lives." COHEN, *supra* note 2, at 801.

198. See *supra* text accompanying notes 49–55.

199. This is not to say that the federal government's actions did not harm Native Hawaiians; they often did, just as the federal government inflicted harms on African Americans and, for that matter, on Asians in Hawaii. In fact, as to the latter, not only did the United States deny the franchise to Asians (while allowing Native Hawaiians to vote), but one of the articulated impetuses for the 1900 Organic Act for the Territory of Hawaii, ch. 339, 31 Stat. 141, was to extend to Hawaii strict limits on the immigration of Asians. See H.R. REP. NO. 56-305, at 5 (1900); see also *supra* note 62 and accompanying text, note 63. As the example of African Americans reveals, however, the government's prior infliction of harms does not render current benefits to the descendants of the harmed group nonsuspect.

200. This is not to suggest, of course, that the United States has no culpability for the destruction of the Hawaiian kingdom; it is just that the kingdom destroyed was not limited to descendants of pre-1778 inhabitants. Accordingly, insofar as one might characterize the overthrown government as an "Indian Tribe[]" for constitutional purposes, the tribe so construed probably would not be limited to those descended from pre-1778 inhabitants, and instead might include later arrivals of a variety of races. While this does not necessarily defeat the argument that the government was a tribe, because it is conceivable that a court would adopt a broad definition of "Indian," it does cast doubt on the argument that the United States's actions in the 1890s provide a basis for giving benefits to a group comprising only pre-1778 inhabitants.

beneficiaries of federal and state programs that can be called an "Indian Tribe[]." If no such entity exists, it is hard to understand how it could be part of a relationship. Put somewhat differently, there would be no entity to "treat" as the Indian tribe. If such an entity were to be created, the sad history of the United States's actions—or, more broadly, Westerners' actions—might be relevant to the question whether the newly formed Native Hawaiian entity could be treated as the monarchy's successor for special relationship purposes. Such a situation would be quite different, however, because there would be an entity that the federal government could treat as an "Indian Tribe[]" that included all Native Hawaiians.

It might seem tempting to characterize the argument slightly differently, as involving the lost rights of Native Hawaiians. On this theory, Native Hawaiians should not lose the rights that are associated with status as a tribe simply because the United States destroyed their government; the United States should grant them the rights that it should never have taken away. The problem with this argument (in addition to the problems addressed above) is that the question, properly understood, is not really about the government granting or refusing to grant "rights." At its most basic level, the inquiry is whether or not a particular relationship exists between two entities. It may be argued that this relationship, in practice, usually confers benefits, but the relationship does not necessarily do so, because it merely gives the federal government greater latitude in singling out Indian tribes. The existence of a special relationship simply means that the government can more easily increase or decrease Indian tribes' rights and benefits, and there is no guarantee which will occur. The special relationship directly empowers the federal government, not Indian tribes. Some might argue that, regardless of the foregoing, the experience of Indian tribes reveals that the special relationship has increased their rights and benefits. Such an argument, however, ignores the long history of actions taken pursuant to the special relationship that seriously harmed Indian tribes. Moreover, such harms are not limited to actions taken long ago; in more recent years the Supreme Court has upheld, under the special relationship, enactments that harmed, rather than benefited, tribal members.<sup>201</sup>

A variation on this argument would be that Native Hawaiians are akin to a terminated Indian tribe, i.e., a tribe that the United States once recognized but no longer does.<sup>202</sup> The analogy is not exact, because terminated tribes were not actually terminated (only their relationship with the federal government was), and many tribal communities remained intact after they lost federal recognition, whereas the Hawaiian government itself was terminated

---

201. See *supra* note 30. For a related discussion of this issue, see *infra* note 246.

202. As a judge and Native American law scholar has noted, "it is technically inaccurate to refer to 'terminated tribes' because it is the federal-tribal relationship and not the tribe that is terminated by statute." WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW* 52 (1st ed. 1981). "Terminated tribe" has become a term of art in Native American law, however, which this Article will use merely as convenient shorthand.

and no continuing entity remained.<sup>203</sup> The analogy does not advance the argument that Native Hawaiians should be treated like current tribes, however. In addition to the issue of the composition of the "tribe" in 1893, there is a more basic reason: Terminated tribes are no longer subject to the special relationship.<sup>204</sup> Thus, even if a court were to accept the analogy to terminated tribes, it probably would not find that the special relationship extended to Native Hawaiians absent an organized Native Hawaiian tribe.<sup>205</sup>

There is one other possible argument based on the terminated tribe analogy: that the statutes benefiting Native Hawaiians are analogous to the distributions of tribal assets that occur when a tribe is terminated. The idea would be that Native Hawaiians never received their tribal assets outright, but instead received a bundle of benefits as a substitute. The statutes benefiting Native Hawaiians, however, are ongoing, permanent programs; they are not mere distributions of assets. We can construe these programs as recompense for Native Hawaiians' subjugation and dispossession, just as we can construe programs benefiting African Americans as recompense for slavery, but both will be subject to strict scrutiny.<sup>206</sup>

---

203. See *supra* notes 56–59 and accompanying text. Even if one construed the post-1893 Republic as constituting a Native Hawaiian government (which would be a stretch, given that it apparently was controlled by Westerners), it, too, was officially terminated: The Annexation Act of 1898 stated that the Government of Hawaii had "cede[d] absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies." Act No. 55, 30 Stat. 750, 750 (1898).

204. See *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 505–06 (1986) (holding that, because of termination, "the special federal services and statutory protections for Indians are no longer applicable to the Catawba Tribe and its members"); *United States v. Antelope*, 430 U.S. 641, 647 n.7 (1977) ("While anthropologically a Klamath Indian even after the Termination Act obviously remains an Indian, his unique status *vis-à-vis* the Federal Government no longer exists" (quoting *United States v. Heath*, 509 F.2d 16, 19 (9th Cir. 1974))); *St. Cloud v. United States*, 702 F. Supp. 1456, 1465 (C.D.S.D. 1988) (holding that Termination Act "terminated the special relationship between St. Cloud and the federal government"); see also Lee Herold Storey, *Leasing Indian Water Off the Reservation. A Use Consistent With the Reservation's Purpose*, 76 CAL. L. REV. 179, 204 n.141 (1988) ("Termination" means that an Indian treaty will no longer be recognized by the United States and that the tribe no longer retains special rights as a sovereign nation."). As the Ninth Circuit stated in *United States v. Washington*, 641 F.2d 1368 (9th Cir. 1981):

When assimilation is complete, those of the group purporting to be the tribe cannot claim tribal rights. While it might be said that the result is unjust if the tribe has suffered from federal or state discrimination, it is required by the communal nature of tribal rights. To warrant special treatment, tribes must survive as distinct communities.

*Id.* at 1373. Congress can, of course, rerecognize a terminated tribe, just as it can newly recognize a tribe, but such an action would still be subject to the limitation suggested by *United States v. Sandoval*, 231 U.S. 28, 46 (1913). See *infra* notes 213–15 and accompanying text.

205. The terminated tribe analogy may nonetheless be relevant to federal government efforts to foster the re-creation of a Native Hawaiian government. See *infra* note 265.

206. There may seem to be an additional argument based on similarities between Indian tribes and Native Hawaiians—namely, that though Native Hawaiians may not be cohesive enough to meet the standards applied today for status as a tribe, neither did some of the currently recognized Indian groups when they were originally recognized. The suggestion would be that Native Hawaiians are no less cohesive than some tribes were when they were recognized, so there is no legitimate, rational basis for depriving Native Hawaiians of recognition.

It should be noted that this is the same attack that nonrecognized American Indian groups can make on the current standards for recognition. It is an attack on the recognition process itself, the relevant

This does not mean, of course, that the history of Native Hawaiians is irrelevant, but merely that it does not create a special relationship. The history still stands as a powerful argument for congressional action to remedy the mistakes made by the United States and, more generally, by Westerners in Hawaii. It is relevant, therefore, to the impetus for congressional action to create tribal entities and, perhaps, to the existence of a compelling governmental interest in assisting Native Hawaiians (or, more narrowly, in assisting their creation of a Native Hawaiian tribe).<sup>207</sup>

---

indigenous group would assert that the current standards are ahistorical and therefore inappropriate (and perhaps violate the group's right to equal protection).

Assuming that certain currently recognized tribes would not, at the time of recognition, have met current standards for tribal status, this argument is nonetheless unavailing. Insofar as the earlier recognition of putatively inchoate groups of American Indians would have been constitutional at the time but would be unconstitutional now, this merely demonstrates that constitutional standards change over time. It is no more inappropriately ahistorical to apply current, higher standards to the recognition of new Indian or Native Hawaiian tribes than it is to apply current, higher standards to statutes singling out the members of one race for a benefit. It may be, for example, that Congress could have constitutionally singled out African Americans for special treatment in 1880, but that does not immunize either that preference or a similar newly created preference today. If the federal government could be estopped from changing its legal standards because the change would be ahistorical, separate but equal might prevail today. One could attempt to distinguish the definition of "Indian Tribe[]" from other parts of the Constitution and argue that the government should not alter its application of this definition. There appears to be no reason, however, why changes in equal protection standards should not affect what the federal government can do, including in its recognition of "Indian Tribes." Nothing in the Constitution suggests that the definition of "Indian Tribe[]" should be hermetically sealed from the remainder of constitutional law such that changes in other aspects of constitutional jurisprudence leave "Indian Tribe[]" unaffected.

Insofar as there may be a few Indian tribes that do not and have never met the relevant requirements for status as a tribe but nonetheless were (and continue to be) recognized, it seems doubtful that this alters the constitutional analysis. It may be that a group has long been subject to benefits, but that does not, of course, mean that those benefits are therefore constitutional. It merely means that no one has yet challenged the existence of the group in court (or courts have ignored equal protection limitations on benefits), and that the other two branches of the federal government have been remiss in their duty to ensure that they act constitutionally by giving benefits on a racial basis only when those benefits are narrowly tailored to further a compelling government interest.

In this regard, it does bear mentioning that there is another possible category: Indian groups that were inchoate at the time they were recognized but, in response to the incentives created by recognition, have become unified over time. Such groups might not have satisfied current constitutional standards at the time they were recognized, but may now have the requisite cohesion because the federal government's programs for tribes encouraged such cohesion. These groups still might be subject to legal challenge, on the theory that one of the requirements for status as an Indian tribe is continuous existence as a tribe since the creation of the tribe hundreds of years ago. *See infra* Section V.B. It seems likely, however, that the tribe in question would survive such a challenge; a court would probably conclude that, whatever the circumstances were of its creation, they now constitute a tribe. This might, in other words, be a case in which a court would defer to the effect of a history of recognition, because that recognition would have resulted in the creation and stabilization of a coherent tribal community. If so, then the failure of the HHCA to foster the creation of Native Hawaiian tribes had profound and dramatic consequences for the current legal status of Native Hawaiians. *See infra* note 276.

207. *See infra* note 265. The complicating factor here is that the "tribe" that the United States helped to destroy was not limited to descendants of pre-1778 inhabitants, *see supra* text accompanying notes 53–55; so, insofar as the federal government's compelling interest would flow from harms inflicted by the United States (rather than those inflicted by Westerners more generally), the relevant harmed group might not be limited to Native Hawaiians.

E. *Federal Statutes Singling Out Native Hawaiians Constructively Confer Tribal Status*

A different argument, based on the protective rather than the destructive aspects of the United States's actions, is that federal statutes, by singling out Native Hawaiians, have constructively conferred upon them tribal status. The idea would be that Congress's history of treating Native Hawaiians as if they were an Indian tribe, and giving benefits to them on that basis, effectively means that Native Hawaiians have been recognized as a tribe. Under this argument, courts should—and perhaps must<sup>208</sup>—defer to the congressional treatment of Native Hawaiians as an Indian tribe.

At the outset, it should be noted that the long history of federal enactments for Native Hawaiians does not advance the argument very far, as it may merely reveal that Congress has violated the equal protection component of the Fifth Amendment since early in this century or that the constitutional standards have changed over time (or both).<sup>209</sup> Statutes are of course presumed

---

208. The argument, in this strongest form, would be that a court may not revisit the question of recognition where Congress has clearly spoken.

209. It is not clear, in fact, at what point the HHCA would have been considered to violate the equal protection component of the Fifth Amendment (assuming, of course, that it does so now). This raises an interesting and difficult question of temporality.

In 1921, when the HHCA was enacted, there would have been three major hurdles for any litigant who wanted to challenge its constitutionality. First, it is not clear that the Supreme Court would have considered such a challenge justiciable. In *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), the Court suggested that congressional decisions regarding Indians were nonjusticiable political questions, so there was no role for the Court to play in considering them. *See id.* at 565. *But cf.* *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1977) (rejecting *Lone Wolf's* suggestion that congressional decisions involving Indian tribes are not justiciable). Second, the Supreme Court's jurisprudence did not include strict scrutiny for measures involving racial classifications, and the Court had not begun construing the Fifth Amendment's Due Process Clause as having an equal protection component. *See, e.g.* *Detroit Bank v. United States*, 317 U.S. 329, 337 (1943) ("Unlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress."); *LaBelle Iron Works v. United States*, 256 U.S. 377, 392 (1921) ("Reference is made to cases decided under the equal protection clause of the Fourteenth Amendment; but clearly they are not in point. The Fifth Amendment has no equal protection clause . . .") (citations omitted). The Secretary of Interior appeared to apply correctly the jurisprudence of the day when, in 1921, he rejected the notion that the HHCA constituted impermissible class legislation, analogizing it to legislation for the benefit of Indians or veterans. *See 1920 Hearings, supra* note 63, at 129–31 (statement of Franklin Lane, Secretary of Interior). He might plausibly have included African Americans on that list as well. It was not until *Korematsu v. United States*, 323 U.S. 214 (1944), that the Supreme Court suggested that strict scrutiny was appropriate for legislation involving racial classifications, *see id.* at 216, and it was not until *Mancari* that the Court articulated the race versus tribe distinction, *see Morton v. Mancari*, 417 U.S. 535, 553–55 (1974). Third, even if the Fifth Amendment had been understood to prohibit the federal government from enacting legislation to benefit a racial or ethnic group, such a prohibition probably would not have been extended to the territory of Hawaii. As the Attorney General of Hawaii noted in testimony before the House Committee on Territories in 1920, the relevant constitutional provisions were understood not to apply to federal actions on territories. *See 1920 Hearings, supra* note 63, at 162–64 (statement of Harry Irwin, Attorney General of Hawaii). The Attorney General, in supporting the constitutionality of the HHCA, stated that "[t]he only provisions of the Constitution of the United States which could, by any construction, affect legislation of this kind, are section 2 of article 4 and section 1 of the fourteenth amendment." *Hawaiian Homes Commission Act, 1920: Hearings on H.R. 13500 Before the Senate Comm. on Territories*, 66th Cong. 134 (1921) (statement of Harry Irwin, Attorney General of Hawaii). Attorney General Irwin explained that the former (the Privileges and Immunities Clause) "has no application to legislation by Congress affecting the Territories," *id.*, and

constitutional, but such a presumption does not become conclusive by the mere passage of time.<sup>210</sup>

Nonetheless, on one level, the argument based on congressional action seems plausible: Congress has great latitude in determining whether or not to recognize a given group as an Indian tribe, and it may seem reasonable to assert that a history of such recognition confers tribal status. One problem with this contention is simply that Congress has not actually recognized Native Hawaiians as a tribe. It has singled them out, but that does not confer recognition. After all, there are a number of statutes that give benefits to all American Indians (just as there are many statutes giving benefits to other racial or ethnic groups), but this by no means suggests that Congress has recognized a tribe encompassing all American Indians, much less that all American Indians are subject to the special relationship such that programs singling them out are subject to rational basis review. Including American Indians within the special relationship on this basis would, in fact, ignore and undercut *Mancari*'s careful distinction between legislation for tribes and legislation for American Indians as a race. As the Court pointedly noted in *Mancari*, the political classification subject to the special relationship—Indian tribes—"exclude[s] many individuals who are racially to be classified as 'Indians.'"<sup>211</sup> If the giving of benefits to a Native American group (in this case, American Indians) had been sufficient to confer tribal status, the Court would not have made this statement; that it did so state confirms that the existence of statutes singling out a Native American group does not constructively confer recognition on that group.<sup>212</sup>

---

that Section 1 of the Fourteenth Amendment "operates only as a protection against State action," *id.* at 135. The Supreme Court articulated a similar position in 1922, holding that, absent congressional extension of particular rights to a territory, only "fundamental" constitutional rights applied there. *See Balzac v. Porto Rico*, 258 U.S. 298, 312–13 (1922); *see also Hawaii v. Mankichi*, 190 U.S. 197, 218 (1903) (holding that provisions of Fifth and Sixth Amendments concerning grand and petit juries were not "fundamental" and therefore not applicable in territory, absent explicit congressional action). It is far from clear that the right to equal protection—specifically, in the context of land—would have been considered to be one of those fundamental rights; in fact, the Ninth Circuit concluded just six years ago that the right to equal opportunity in the acquisition of land on the Northern Marianas Islands was not fundamental, and on that basis held that Congress acted constitutionally in restricting alienation of land to native peoples in the territory's constitution. *See Wabot v. Villacrusis*, 958 F.2d 1450, 1459–62 (9th Cir. 1990).

Thus, although the HHCA was passed 75 years ago, the long history is not particularly significant; during much of that time, it escaped invalidation because the prevailing view was that, even if it were properly understood as singling out Native Hawaiians as a racial group, such an action was not justiciable and raised no particular constitutional problems. In fact, the long history may cut against deferring to the legislative judgment reflected in the HHCA, because it was passed at a time when Hawaii was not yet a state and when Congress understood its obligations under the equal protection component of the Fifth Amendment very differently; the changes in Supreme Court jurisprudence and Hawaii's status may suggest that now is the time to consider the HHCA anew.

210. *See, e.g., INS v. Chadha*, 462 U.S. 919 (1983) (striking down longstanding congressional policy of inserting legislative vetoes in legislation); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (striking down longstanding federal policy of racial segregation in public schools).

211. *Mancari*, 417 U.S. at 553 n.24.

212. Significantly, the Court in *Mancari* had before it a longstanding congressional enactment that encompassed nontribal Indians: the IRA, which applied to those who were members of tribes or had 50%

Moreover, even if Congress *had* recognized Native Hawaiians as a tribe (constructively or formally), such an action would not be sufficient to confer tribal status and thereby create a special relationship. In *United States v. Sandoval*,<sup>213</sup> the Court, after discussing Congress's plenary power over Indian tribes, stated, "Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe . . . ."<sup>214</sup> More recently, the Court stated that its recognition of Congress's important role "has not deterred this Court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment. [citing *Mancari*]. 'The power of Congress over Indians may be of a plenary nature; but it is not absolute.'"<sup>215</sup> Put somewhat differently, the mere fact that Congress may proclaim a group to be a tribe, or a benefit to be nonracial, does not make it so. If Congress decided to avoid the strictures of *Adarand Constructors, Inc. v. Peña*<sup>216</sup> by declaring that all minority racial and ethnic groups were Indian tribes (or perhaps instead that all Native Hawaiians who contributed, say, more than \$100 to a particular political action committee constituted an Indian tribe), there is no reason to believe that a court would

---

native blood. If the existence of such an enactment (the foundational modern statute on Indians, no less) had been sufficient to create a special relationship with the class it delineated, the Court could have simply deferred to its definition. In reality, of course, *Mancari* avoided the language of the IRA and delineated the special relationship as applying to tribal members, rather than all those covered by the statute. *See id.*, *supra* note 38.

213. 231 U.S. 28 (1913).

214. *Id.* at 46; *see also* *Baker v. Carr*, 369 U.S. 186, 216–17 (1962) (quoting same language from *Sandoval*, then stating, "Able to discern what is 'distinctly Indian,' the courts will strike down any heedless extension of that label. They will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power.") (citation omitted); *United States v. Chavez*, 290 U.S. 357, 363 (1933) (quoting same language from *Sandoval*); *United States v. Candelaria*, 271 U.S. 432, 439 (1926) (same); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 582 n.3 (1st Cir. 1979) ("Nor can Congress arbitrarily label a group of people a tribe.").

As Christopher Ford has noted, the Court's conclusion in *Sandoval* underscored its unwillingness simply to defer to Congress:

In finding that the Pueblo Indians of New Mexico could be regulated as an Indian tribe pursuant to the enabling legislation which authorized New Mexico's entry into the Union, the Court did not stop upon finding a sort of de facto federal recognition resulting from the Pueblos' treatment by the President and Congress as "dependent communities entitled to [United States] aid and protection, like other Indian tribes." Rather, the Court undertook an independent examination into the "Indian-ness" of the Pueblo groups: "[C]onsidering their Indian lineage," and their "isolated communal life, primitive customs and limited civilization, this assertion of guardianship over them cannot be said to be arbitrary but must be regarded as both authorized and controlling."

Christopher A. Ford, *Executive Prerogatives in Federal Indian Jurisprudence: The Constitutional Law of Tribal Recognition*, 73 DENV. U. L. REV. 141, 157 (1995) (footnotes omitted) (quoting *Sandoval*, 231 U.S. at 47).

215. *Delaware Tribal Bus. Comm.*, 430 U.S. at 84 (quoting *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946)); *see also* *United States v. Sioux Nation of Indians*, 448 U.S. 371, 413 (1980) (stating that deference to Congress in tribal matters embodied in political question doctrine "has long since been discredited in takings cases, and was expressly laid to rest in *Delaware Tribal Business Comm[itee] v. Weeks*").

216. 115 S. Ct. 2097 (1995).

conclude that Congress's declaration of tribal status had, *ex proprio vigore*, rendered the group a tribe. The Court would likely show great deference to Congress's determination of tribal status, but it would not find that the determination alone was sufficient.

#### IV. IMPACT OF THE LACK OF A SPECIAL RELATIONSHIP ON PROGRAMS SINGLING OUT NATIVE HAWAIIANS

The foregoing indicates that current constitutional jurisprudence would not include Native Hawaiians among those who are subject to the special relationship with the federal government.<sup>217</sup> As a result, government programs<sup>218</sup> that single out Native Hawaiians for different treatment would

---

217. Interestingly, the question whether the special relationship extends to Native Hawaiians may have limited significance for OHA—because OHA might be subject to strict scrutiny in any event. In the one Supreme Court case in which the Court considered an equal protection challenge to a state action that treated Indian tribes (or their members) specially, the Supreme Court stated clearly that, though “the unique legal status of Indian tribes under federal law” permits the *Federal Government* to enact legislation singling out tribal Indians, . . . *States do not enjoy this same unique relationship with Indians . . .*” *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500–01 (1979) (quoting *Mancari*, 417 U.S. at 551–52) (emphasis added). Although the Court did not specify the level of scrutiny that would apply to state programs that single out tribal Indians (because it found that the special relationship applied in this case), the exclusion of states from the special relationship indicates that rational basis review would not apply. The reasoning above, *see infra* text accompanying notes 117–21, regarding *Mancari*’s distinction between tribal and racial classifications applies here: The classification that is not subject to the special relationship (in *Mancari*, racial classifications, and in *Yakima Nation*, classifications made by states) presumably would be subject to some form of heightened scrutiny, because otherwise the Court’s distinction between those classifications and classifications subject to the special relationship would be irrelevant and misplaced. Thus, some form of heightened scrutiny—probably the one that applies to other state enactments that single out other ethnic groups, i.e., strict scrutiny under *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)—would appear to apply to such enactments. *See also infra* note 293.

OHA could defend itself by pointing out that, in *Yakima Nation*, the Court actually found that the state enactment at issue was subject to rational basis review, because the state “was legislating under explicit authority granted by Congress” by virtue of a federal law that specifically consented to the state legislation at issue. *See Yakima Nation*, 439 U.S. at 501. OHA could invoke section 5(f) of the Hawaii Admission Act, which provided that certain lands granted to Hawaii were to be held by the state as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use.

48 U.S.C. § 5(f) (1994). The problem for OHA is that its beneficiaries are not limited to “[N]ative Hawaiians, as defined by the Hawaiian Homes Commission Act,” and some of its revenues do not come from the lands referred to in section 5(f). *See infra* note 242; *supra* notes 71–78 and accompanying text. As a result, it is not at all clear that *Yakima Nation*’s safe harbor for authorized state programs would apply here. *See also infra* note 292. Thus, with or without a special relationship between the federal government and Native Hawaiians, OHA probably would be subject to heightened scrutiny.

218. Both *Adarand* and *Croson* involved government programs that contained racial classifications. *See Adarand*, 115 S. Ct. at 2101–04; *Croson*, 488 U.S. at 493–94 (plurality opinion). The Court has ruled in a number of cases that the equal protection components of the Fifth and Fourteenth Amendments reach only state action, so *Adarand* and *Croson* have no direct application to private programs. *See, e.g.,* *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619–20 (1991); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972); *The Civil Rights Cases*, 109 U.S. 3, 11 (1883); *see also* *TRIBE*, *supra* note 151, at 1688–720 (discussing difficulty of distinguishing state from private action). It should be noted, however, that the Supreme Court has interpreted certain statutes governing private action as imposing the same equal protection constraints as the Constitution. *See, e.g.,* *General Bldg. Contractors Ass’n v. Pennsylvania*, 458



be subject to the strict scrutiny of *Adarand Constructors, Inc. v. Peña*<sup>219</sup> and *City of Richmond v. J.A. Croson Co.*<sup>220</sup> if they were challenged on equal protection grounds. Just as the preferences for "Native Americans"—defined racially—in the statutes at issue in *Adarand*<sup>221</sup> and *Croson*<sup>222</sup> were presumably subject to strict scrutiny,<sup>223</sup> so, too, would be the preferences for Native Hawaiians.<sup>224</sup> The impact of such scrutiny on programs for Native Hawaiians would likely be significant.

The familiar standard of strict scrutiny is that racial or ethnic classifications "are constitutional only if they are narrowly tailored measures that further compelling governmental interests."<sup>225</sup> To satisfy the compelling interest requirement, the state and federal governments could not rely on historical, societal discrimination against Native Hawaiians,<sup>226</sup> nor could they rely on amorphous claims of discrimination in particular industries or spheres.<sup>227</sup> Instead, they would have to produce particularized findings

U.S. 375, 390–91 (1982) (holding that section 1981 of Civil Rights Act of 1866 imposes same constraints as Constitution). *But see* *Johnson v. Santa Clara County Transp. Agency*, 480 U.S. 616, 632–33 (1987) (holding that Title VII is not coterminous with Equal Protection Clause, so that private employers have more latitude than public employers).

219. 115 S. Ct. 2097 (1995).

220. 488 U.S. 469 (1989).

221. 115 S. Ct. at 2102–03 (discussing statutory presumption that "Native Americans, Asian Pacific Americans, and other minorities" are socially and economically disadvantaged).

222. 480 U.S. at 478 (discussing statutory scheme classifying Indians, Eskimos, and Aleuts as "minority group members" for purpose of defining Minority Business Enterprises).

223. As was noted above, the programs at issue in *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547 (1990), and *Fullilove v. Klutznick*, 448 U.S. 448 (1980)—the other two major affirmative action cases—also had preferences for Native Americans, defined racially, that were subject to heightened scrutiny. *See Metro Broad.*, 497 U.S. at 553 n.1; *Fullilove*, 448 U.S. at 454; *supra* text accompanying notes 138–42.

224. This is particularly likely in light of the fact that neither Congress nor the Department of Interior has formally recognized Native Hawaiians as a tribe. In the absence of a formal recognition, and in light of the many difficulties inherent in such recognition, *see supra* notes 213–15 and accompanying text, it seems highly implausible that a court would, on its own authority, find that a special relationship exists.

This does not mean that Congress could avoid these problems simply by recognizing Native Hawaiians as a tribe. Such recognition, without other actions, probably would not convince a court that the special relationship applied. *See infra* note 271. The point is simply that, without any federal recognition, *Adarand* and *Croson* almost certainly would apply.

225. *Adarand*, 115 S. Ct. at 2113.

226. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989) (stating that "sorry history of both public and private discrimination in this country [that] has contributed to a lack of opportunities for black entrepreneurs" is insufficient to justify racial classification in contracting); *id.* at 505 ("To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group.")

The Court in *Adarand* did not attempt to explicate how strict scrutiny should be applied in that case; instead it characterized its holding as extending *Croson's* strict scrutiny standard to federal programs, *see Adarand*, 115 S. Ct. at 2110–11, 2113–14 (although it did leave open the possibility that Congress's powers might be slightly greater than states' powers, *see infra* text accompanying note 240). *Croson's* delineation of the strict scrutiny standard stands, therefore, as the prevailing Supreme Court treatment of this issue. On the application of *Adarand*, see generally Office of Legal Counsel, Memorandum to General Counsels re: *Adarand*, June 28, 1995 [hereinafter OLC Memorandum], and Lia A. Fazzone, Comment, *Raise High the Roof Beam: Adarand Constructors, Inc. v. Peña and the New Law of Scrutiny for Federal Affirmative Action*, 73 DENV. U. L. REV. 599 (1996).

227. *See Croson*, 488 U.S. at 499 (stating that "an amorphous claim that there has been past discrimination in a particular industry cannot justify" racial quota).

sufficient to ensure that each challenged program was remedying the present effects of past discrimination in the relevant sphere.<sup>228</sup> Moreover, they would have to show that they identified discrimination with some specificity *prior* to enacting the relevant programs.<sup>229</sup> In addition, relying on underrepresentation of Native Hawaiians in a given industry or sector would be insufficient; the federal or state government would have to demonstrate "a 'strong basis in evidence for its conclusion that remedial action was necessary.'"<sup>230</sup> Such evidence, it appears, must rise to the level of a *prima facie* showing of discrimination against Native Hawaiians.<sup>231</sup> Satisfying the narrow tailoring requirement, meanwhile, would depend upon a number of factors,<sup>232</sup> including whether the relevant government considered race-neutral alternatives and found that they would not achieve the program's aims;<sup>233</sup> whether the program excluded those who, though Native Hawaiian, "ha[d] [not] suffered from the effects of past discrimination" against Native Hawaiians;<sup>234</sup> whether status as a Native Hawaiian is a requirement for eligibility or merely one of many factors;<sup>235</sup> whether the program was temporary or at least provided for periodic review;<sup>236</sup> and whether the program's effects on non-Native Hawaiians was significant or intrusive.<sup>237</sup>

It seems unlikely that many, if any, of Hawaii's current programs singling out Native Hawaiians could meet these standards. The compelling interest requirement alone would pose an enormous hurdle. Hawaii would not be able to rely on general statistical disparities between Native Hawaiians and other Hawaiians to justify preferential treatment. With respect to each program,

228. *See id.* at 498.

229. *See id.* at 504. *Croson* did not clarify whether the government entity must have evidence of discrimination sufficient to satisfy strict scrutiny before it acts, or whether it can merely have a significant quantum of evidence at the time of enactment and later buttress it with additional studies. Lower courts, however, have allowed the use of post hoc studies to supplement pre-enactment evidence. *See Concrete Works of Colo., Inc. v. City of Denver*, 36 F.3d 1513, 1521 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1315 (1995); *Contractors Ass'n v. City of Philadelphia*, 6 F.3d 990, 1004 (3d Cir. 1993); *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 60 (2d Cir. 1992).

230. *Croson*, 488 U.S. at 500 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion)).

231. *See id.* at 500, 501. Neither *Adarand* nor *Croson* explicitly rejected the possibility that a nonremedial objective—such as diversity—could constitute a compelling interest. Justice O'Connor's opinion in *Croson* strongly so suggested, however: "Unless [classifications based on race] are *strictly reserved for remedial settings*, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *Id.* at 493 (plurality opinion) (emphasis added).

Even if a nonremedial objective could constitute a compelling interest, it is not clear that many, if any, of the programs benefiting Native Hawaiians could be persuasively characterized as advancing such an objective. *Cf. Metro Broad., Inc. v. FCC*, 497 U.S. 547, 569–79 (1990) (reviewing evidence that broadcast licensing preferences for minorities adds variety to perspectives communicated by radio and television).

232. *See Fazzone, supra* note 226, at 616–17; OLC Memorandum, *supra* note 226, at 19–28.

233. *See Croson*, 488 U.S. at 507.

234. *See id.* at 508.

235. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978) (opinion of Powell, J.).

236. *See United States v. Paradise*, 480 U.S. 149, 178 (1987) (plurality opinion); *Fullilove v. Klutznick*, 448 U.S. 448, 489 (plurality opinion); *id.* at 513 (Powell, J., concurring).

237. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282–84 (1986) (plurality opinion).

Hawaii would have to show that Native Hawaiians were subject to discrimination in the field that the program covered, and the proof would have to be in the form of identification of specific instances of past discrimination against benefited individuals or, at a minimum, gross statistical disparities focused on the percentage of qualified Native Hawaiians in a particular sphere.<sup>238</sup> Such statistics can be supplied by disparity studies, but courts will scrutinize them carefully. In several cases a court has invalidated a program that relied on new disparity studies, because the court disputed the studies' findings of discrimination on which the affirmative action program was based.<sup>239</sup>

As to federal programs, the Court in *Adarand* left open the possibility that Congress may have greater latitude than states in fashioning a race-based program, in light of its power under Section Five of the Fourteenth Amendment.<sup>240</sup> Assuming that such latitude exists, however, it seems doubtful that it would have any effect on the basic requirements of strict scrutiny, such as the requirement that there be a strong basis in evidence that the relevant remediation is necessary.<sup>241</sup> There is little reason, therefore, to believe that any differences in the standards applied to federal versus state programs for Native Hawaiians would be significant.<sup>242</sup> The upshot is that

---

238. The Court in *Croson* indicated what it meant by relevant statistics. Richmond had emphasized that in the five years before its program began, minority businesses were awarded less than one percent of construction contracts despite the fact that minorities constituted half of Richmond's population, and it argued that this disparity created an inference of discrimination in the construction industry. Richmond also noted that there were very few minority members of local construction trade associations. The Court rejected these comparisons as inadequate; it said that more probative statistical inquiries would have compared the number of qualified minorities in the relevant labor market with the percent of contracts received, and the number of minority contractors qualified to join trade associations with the number of minorities in those associations. See *Croson*, 488 U.S. at 499-504.

239. See *Contractors Ass'n v. City of Philadelphia*, 893 F. Supp. 419, 427-38 (E.D. Pa. 1995) (rejecting disparity study as flawed and unreliable); *Associated Gen. Contractors v. City of New Haven*, 791 F. Supp. 941, 946-48 (D. Conn. 1992) (rejecting evidence gathered by New Haven as inadequate factual predicate to justify set-aside ordinance), *vacated as moot*, 41 F.3d 62 (2d Cir. 1994), *see also* *Concrete Works v. City of Denver*, 36 F.3d 1513, 1530-31 (10th Cir. 1994) (rejecting certain findings but remanding rather than striking down program), *cert. denied*, 115 S. Ct. 1315 (1995), *Lamprecht v. FCC*, 958 F.2d 382, 395-98 (D.C. Cir. 1992) (Thomas, J., sitting by designation) (rejecting findings (in case involving nonremedial program) indicating that preference for women would ameliorate barriers faced by women).

240. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2114 (1995).

241. See *Croson*, 488 U.S. at 500 (treating requirement of strong basis in evidence as integral to strict scrutiny standard); *see also* OLC Memorandum, *supra* note 226, at 32 ("[A]fter *Adarand*, Congress is subject to the *Croson* 'strong basis in evidence' standard.").

The main potential difference that the Court has suggested between Congress's powers under Section 5 and those of the states is that Congress can rely on national findings, rather than having to make findings for each affected region of the country. See *Croson*, 488 U.S. at 504 (noting possibility of Congress making national findings); *Fullilove*, 448 U.S. at 515-16 n.14 (Powell, J., concurring) ("The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of a governmental body."). This distinction would have no real impact on programs benefiting Native Hawaiians, as the geographical breadth of any congressional findings regarding Native Hawaiians presumably would not be an issue.

242. If the review of federal programs were more lenient because of Congress's Section 5 authority, such review would probably apply not only to federal programs but also to a program like the HHCA that Congress originally enacted and then imposed on Hawaii. After all, Congress did not merely authorize

many (if not all) programs for Native Hawaiians would likely be invalidated.<sup>243</sup>

#### V. METHODS OF BRINGING NATIVE HAWAIIANS WITHIN THE SPECIAL RELATIONSHIP WITH THE FEDERAL GOVERNMENT

It thus appears that existing legislation singling out Native Hawaiians would be subject to strict scrutiny under *Adarand* and *Croson*, and that this level of scrutiny would jeopardize a number of programs. Before I move to the next question—how strict scrutiny can be avoided—an antecedent question that lurks in the background bears brief mention: Would most Native Hawaiians

---

Hawaii's passage of the HHCA; it made such passage a condition of statehood. *See* Admission Act § 4 ("As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State . . ."). Moreover, the requirement was not that Hawaii enact some form of homelands program, but that it pass the HHCA. Hawaii has enacted changes to the HHCA, but most of them have been approved by Congress (because the Admission Act required that certain changes depend upon federal consent). *See supra* notes 64–67.

There are, however, some changes to the HHCA that have not been approved by Congress (usually because the Admission Act exempted them from this requirement), and it could be argued that such changes mean that the HHCA has exceeded the federal authorization and thus is outside Congress's Section 5 powers. *See supra* notes 64, 67. This presents a thorny question. It might be noted that the Admission Act specifically permitted such changes, and that Hawaii is legislating pursuant to that authorization. The problem with this reasoning is that giving the power to change is different from authorizing the changes themselves; after all, the Admission Act also allows Hawaii to amend any of the territorial laws that Hawaii inherited (except the HHCA, of course) and to have the powers of lawmaking ordinarily accorded to states, *see* Admission Act § 15, but that does not mean that each amendment of a territorial law or each new law can thereby be characterized as authorized by the federal government.

In any event, even if all of the HHCA were construed as enacted pursuant to Congress's Section 5 authority, it seems unlikely that a court would reach the same conclusion with respect to the other major state program for Native Hawaiians, OHA. Unlike the HHCA, the Hawaii law (in this case, a constitutional amendment) creating OHA was not required by the federal government. It was the product of a state plan to benefit all Native Hawaiians—i.e., all those who were descended from pre-1778 inhabitants. Many legislators apparently believed that the creation of OHA was grounded in section 5(f) of the Admission Act, which provided that certain federal lands were to be "held by . . . [Hawaii] as a public trust" for five purposes, one of which was "the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920." Admission Act § 5(f); *see* Van Dyke, *supra* note 19, at 72–73; 80-8 Op. Haw. Att'y Gen. 12–13 (1980) ("OHA insures that native Hawaiians will receive a direct beneficial interest from public lands."). OHA's revenue, however, is not limited to that from the public lands delineated in section 5(f), so the program's implementation is much broader than was provided for by the Admission Act. Furthermore, the class of beneficiaries of OHA programs includes all descendants of pre-1778 inhabitants, rather than the HHCA's limitation to those with 50% or more native blood. *See supra* text accompanying notes 71–75. This definition more than doubles the pool of potential beneficiaries of OHA (from 81,000 to 209,000) and, in this way, exceeds the scope of the original authorization. *See supra* note 73.

243. It also bears mentioning that the equal protection analysis could be affected by the fact that, though Native Hawaiians are a minority, there is no ethnic majority in Hawaii; in fact, according to the State of Hawaii's figures, Native Hawaiians, Japanese, and Caucasians are the three biggest ethnic groups in Hawaii, each constituting between 19% and 23% of the population. *See* HAWAII DEP'T OF HEALTH, *supra* note 54, at A-66 (calculating Hawaii's population as 19.5% Native Hawaiian—defined as having any native blood—23% Caucasian, 20% Japanese, 10.5% Filipino, 4.5% Chinese, and 22.5% "others"). In light of the absence of a majority group, the Court might examine the legislative enactments for Native Hawaiians more closely, on the theory that various combinations of these minority groups could have aggregated their voting power in the legislature in ways that benefited them and harmed the other minority groups.

(and, for that matter, Native Americans) prefer that they be treated as participants in the special relationship that the Supreme Court has delineated? The Court has construed the special relationship as entailing broad federal power over Indian tribes; and, as was noted above, the Court has treated all measures singling out tribes (or their members) as subject to rational basis review, irrespective of whether they benefited or harmed those singled out.<sup>244</sup> As the Court stated in upholding the constitutionality of "checkerboard" criminal jurisdiction that was disadvantageous to Indian tribes, "'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive."<sup>245</sup> This has led some commentators to suggest that the special relationship, as applied by the Court, may be more harmful than helpful to Indians' interests.<sup>246</sup> For Indian tribes, jettisoning the special

---

244. See *supra* notes 30, 40–44 and accompanying text.

245. *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500–01 (1979) (quoting *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974)).

246. Professor L. Scott Gould put the point trenchantly:

Although *Mancari* was greeted by many as a victory for Indians, it was correctly foreseen by others as containing the seeds for discrimination against the tribes it purported to protect and against Indians as individuals. *Mancari*'s perfidy is that, although enunciating a congressional responsibility to tribes, it imposes no limits on the use of the political classifications it creates, thereby allowing the subterfuge of status to overcome distinctions which would otherwise be blatantly unconstitutional.

L. Scott Gould, *The Congressional Response to Duro v. Reina: Compromising Sovereignty and the Constitution*, 28 U.C. DAVIS L. REV. 53, 96 (1994) (footnotes omitted); see also Ball, *supra* note 28, at 62 ("Although the trust doctrine has undeniably served as a remedy in certain instances of federal mismanagement of tribal lands and money, it appears in fact primarily to give moral color to depredation of tribes."); Frickey, *supra* note 22, at 1139 n.12 (1990) (citing *Mancari* and noting that "[i]t is more than a little ironic that the Americans who were here first have essentially the same equal protection guarantees as nonresident aliens"); cf. COHEN, *supra* note 41, at 171 ("In private law, a guardian is subject to rigid court control in the administration of the ward's affairs and property. In constitutional law the guardianship relation has generally been invoked as a reason for *relaxing* court control over the action of the 'guardian.'").

Many commentators have sought to eliminate the harmful aspects of the special relationship by suggesting that rational basis review should be limited to legislation that benefits Indians or furthers tribal self-government. See Goldberg-Ambrose, *supra* note 115, at 174–76; Clinton, *supra* note 23, at 1013–16; Johnson & Crystal, *supra* note 40, at 606. Such a position, of course, is premised upon a rejection of Supreme Court jurisprudence and thus is beyond the scope of this Article. It does bear mentioning, however, that the help/harm dichotomy might in some instances be difficult to apply and thus of limited usefulness. After all, earlier in this century limitations on Native Americans' access to alcohol were often enacted in an attempt to protect Native Americans, who were thought incapable of handling alcohol, and these restrictions were considered by many (including the Supreme Court) to be beneficial to Native Americans, see, e.g., *United States v. Sandoval*, 231 U.S. 28, 41–44 (1913) (cataloging statements in favor of limitations); yet today most would say that these restrictions harmed Native Americans. Moreover, such difficulties are by no means limited to legislation passed one hundred years ago. To pick an example that has more modern overtones, how should a court characterize a federal government program under which federal and tribal governments worked together to find, treat, and, if necessary, incarcerate pregnant Indian women who abused alcohol or other drugs? Furthermore, the complex task of distinguishing between harm and benefit is rendered more difficult by the fact that the goal of benefiting Indians might sometimes be at cross-purposes with the goal of furthering tribal self-government, leading to the difficult question of which should prevail. To take a hypothetical regulation from this age of devolution of government services to the state and local level, how should a court treat federal legislation under which (formerly) federal government benefits were distributed by states, except that tribes distributed funds to all their members? This would probably enhance the power and stability of tribal governments, but might be opposed by those

relationship would entail convincing the Supreme Court to alter its jurisprudence by abandoning *Mancari* and its progeny. If, however, current programs for Native Hawaiians are not subject to the special relationship, then Native Hawaiians do have the choice whether to pursue the constitutional status of "Indian Tribe[]" and thereby enter the special relationship or to leave matters as they stand and thereby avoid the harmful effects that sweeping government power could entail.<sup>247</sup> If Native Hawaiians decide to take the latter route, they need read no further; if, on the other hand, they decide that the benefits of the special relationship outweigh its costs, the remainder of this Part addresses whether and how that can be achieved—that is, how (if at all) Native Hawaiians can be brought within the special relationship between the federal government and Indian tribes.

### A. *Methods of Creating a Native Hawaiian Tribe or Tribes*

#### 1. *Native Hawaiians Organizing Themselves into Tribes*

One alternative is for Native Hawaiians to organize themselves into a tribe-like organization or organizations.<sup>248</sup> Native Hawaiians could create an association that would assume the functions and role played by tribes among American Indians. Thus, they could elect a set of leaders and agree to be bound by tribal law. If possible, they could live on a contiguous piece of land. In this way, they could demonstrate the characteristics of "tribeness" that the Supreme Court identified in *Montoya v. United States*.<sup>249</sup>

Some Native Hawaiian groups have already attempted to create such an organization, but each has attracted only a small fraction of Native Hawaiians.<sup>250</sup> Another possibility was raised by the recent Native Hawaiian vote, the results of which were announced this past September.<sup>251</sup> In summer

---

who were distant from their tribal leadership. In particular, for many Native Americans who did not live on the lands of their tribe, it might come as a rude shock to find out that their tribe still claimed them as members and thus now had the exclusive power over their federal benefits.

247. The recent Native Hawaiian vote provides some guidance on this question. Seventy-three percent of those who returned ballots voted in favor of the creation of a Native Hawaiian government. *See infra* text accompanying note 254. The significance of this figure is mitigated by two factors, however. First, only 40% of those who received ballots sent them in (and, in light of the dispute over the number of Native Hawaiians, it is not even clear what percentage of Native Hawaiians received ballots in the first place). *See supra* note 54; *infra* text accompanying note 261. Second, it is not at all clear that voters understood the potential ramifications of their vote regarding the creation of a special relationship and the concomitant enhanced power of the federal government.

248. As will be discussed below, the possible requirement that a newly recognized tribe be the successor to a historical sovereign entity complicates the question whether a single tribe or a series of tribes would stand on stronger constitutional footing. *See infra* notes 284–87 and accompanying text. For purposes of simplicity, this Article will refer to the creation of a single Native Hawaiian tribe, though it should be remembered that the creation of several tribes might also be possible.

249. 180 U.S. 261, 266 (1901).

250. *See supra* note 173.

251. The Hawaii statute that authorized this vote (codified as a note to the Hawaii Organic Act) provides in relevant part:

1996 a ballot was mailed to all "Hawaiians"—defined as all who are descended from pre-1778 inhabitants<sup>252</sup>—asking the following question: "Shall the Hawaiian people elect delegates to propose a Native Hawaiian government?"<sup>253</sup> Of the 30,423 valid ballots that were returned, 22,294 (or 73%) were marked yes.<sup>254</sup> The plebiscite is planned as the first of six steps toward the creation of a Native Hawaiian government: According to the plan, there will now be an election of delegates, the formation of a research group to collect information about possible forms of government, a convention of delegates that would draft a proposed constitution, extensive public hearings, and, finally, a vote of Native Hawaiians on whether or not to approve the proposed constitution.<sup>255</sup> The idea is that Native Hawaiians will create their own governing body (akin to an Indian tribe) and make decisions through it, "rather than through government-appointed or self-appointed individuals and organizations," as is currently the case.<sup>256</sup> The explicit intention, then, is to

---

The purpose of this Act is to acknowledge and recognize the unique status that the Native Hawaiian people bear to the State of Hawaii and to the United States and to facilitate the efforts of the Native Hawaiian people to determine self-governance of their own choosing. In the spirit of self-determination and by this Act, a Hawaiian sovereignty elections council is established to:

- (1) Hold a Native Hawaiian Vote in 1996 to determine the will of the Native Hawaiian people for self-governance of their own choosing; and
- (2) Based upon the Native Hawaiian Vote approved by a majority of ballots cast, provide for a fair and impartial process to resolve the issues relating to form, structure, and status of Hawaiian self-governance.

Hawaii Organic Act § 2, 1993 Haw. Sess. Laws 359 (as amended by 1994 Haw. Sess. Laws 200 and 1996 Haw. Sess. Laws 140).

The vote was originally planned for 1995 but was postponed because the Hawaiian government cut its funding. *See* Ragaza, *supra* note 173, at 48. In addition, the legislation providing for the vote originally referred to the creation of an "indigenous sovereign nation," but that was amended in 1996 to refer to "self-governance." *See* 1996 Haw. Sess. Laws 140; *Rice v. Cayetano*, Nos. Civ.96-00390 DAE, Civ.96-00616 DAE 1996 WL 562072, at \*2 n.4 (D. Haw. Sept. 6, 1996). One other change of note was that the mandate required to authorize the Hawaiian Sovereignty Elections Council to proceed was changed from a majority of Native Hawaiians to a majority of votes cast. *See* 1996 Haw. Sess. Laws 140; *Rice*, 1996 WL 562072, at \*2 n.4; *see also infra* note 261.

252. The voting guidelines adopted by the state legislature require that a person be "Hawaiian" to vote, and stated that a "Hawaiian" was "any descendant of the indigenous people inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands prior to 1778." *See Rice*, 1996 WL 562072, at \*2.

253. *See id.* at \*2.

254. *See* Walter Wright, *Hawaiians Vote Yes*, HONOLULU ADVERTISER, Sept. 12, 1996, at A-1.

255. *See* HAWAIIAN SOVEREIGNTY ELECTIONS COUNCIL, TO BUILD A NEW NATION (HO'OKŪKULU HE AUPUNI HOU) 6 (n.d.).

256. HAWAIIAN SOVEREIGNTY ELECTIONS COUNCIL, *supra* note 172, at 12. The report to the legislature further states:

Some Hawaiian organizations have developed constitutions, position papers, and master plans for sovereignty or independence. In essence these organizations are political parties, each earnestly advancing their [sic] own platforms [sic]. These organizations are self-appointed. They have not received the consent of the Hawaiian people, as a whole, to be their government.

... No one organization can presume to represent the Hawaiian people without the Hawaiian people's consent to be governed by that organization. No one organization can claim the assets and entitlements of the Hawaiian people without the consent of the Hawaiian people to be represented [by] them for that express purpose.

*Id.* at 13.

organize a native government that can serve the same functions as a tribal one.

It is not clear that the government will be organized as planned, in part for reasons that flow out of the state's involvement in the process. First, the state government funded the vote and may be asked to fund (through the legislature and/or through OHA) further steps in the process.<sup>257</sup> The state funding for the vote sparked an unsuccessful attempt to enjoin the release of the vote.<sup>258</sup> The claim against the vote may now be moot (because the figures were released), but further state funding may eventually lead to Ninth Circuit review of state involvement and invalidation on equal protection and Fifteenth Amendment grounds.<sup>259</sup> Second, the state's involvement led to a split among Native Hawaiian groups. Many Native Hawaiian groups (such as Ka Lahui Hawaii) called for a boycott of the vote, contending that it was not a true reflection of Native Hawaiians' wishes, but instead a state-controlled process.<sup>260</sup> The absence of unity may have been reflected in the total number of votes cast. Only forty percent of the ballots mailed out were returned, as compared with seventy-three percent of the ballots returned in the most recent OHA elections.<sup>261</sup>

In light of the discord among Native Hawaiian groups (and the possibility of a successful legal challenge to further state involvement), it is not clear that the process begun by the Native Hawaiian vote will produce a Native Hawaiian government, much less one that meets the constitutional minima for status as a tribe. Nonetheless, the vote may be a promising start toward Native Hawaiians' creation of a Native Hawaiian government.

Whether Native Hawaiians choose to organize a tribe through the plebiscite process or a different one, the primary attraction of Native

257. See Wright, *supra* note 254, at A-2.

258. See Rice, 1996 WL 562072.

259. If the state were not involved, a referendum or other process leading toward the creation of an independent Native Hawaiian organization would, of course, raise no constitutional issues; it would stand on the same footing as any other private election to the governing board of a private entity. Moreover, as this Section has suggested, it would be an appropriate way for Native Hawaiians to organize themselves into a tribal entity.

It should be noted, though, that similar constitutional problems surrounding OHA's electorate could not be solved so simply, as OHA itself is a governmental, rather than private, entity. Thus, even if there were no state funds used in organizing OHA's elections, the fact remains that the elections are for a unit of the government. It is not clear that anything turns on the form of OHA's elections, however, because OHA may be unconstitutional anyway. See *supra* notes 217, 242.

260. See *Ka Lahui Hawai'i Rebuttal*, *supra* note 173; Pat Omandam, *Native Vote Opponents Rap Results*, HONOLULU STAR-BULLETIN, Sept. 13, 1996, at A7.

261. See *Hawaiian Vote: A Signal for Caution*, HONOLULU ADVERTISER, Sept. 12, 1996, at A12; RESULTS OF VOTES CAST, GENERAL ELECTION AND SPECIAL ELECTION FOR THE OFFICE OF HAWAIIAN AFFAIRS, NOVEMBER 8, 1994, at 395 (n.d.).

Interestingly, the legislation on the Native Hawaiian vote originally provided that the sovereignty process would move forward if a majority of the "qualified voters"—that is, a majority of Native Hawaiian adults—approved of the proposition to create a Native Hawaiian government. Legislation passed in 1996 (after some Native Hawaiian groups had said they would boycott the vote) amended that threshold, changing "qualified voters" to "votes cast." See 1996 Haw. Sess. Laws. 140; Rice, 1996 WL 562072, at \*2 n.4. The change proved to be significant: Over 70% of the votes cast favored the proposition, but they represented less than one-third of the qualified voters.



Hawaiians organizing themselves into a tribe is the likelihood that the resulting organization would, in both its structure and its goals, reflect the aims and desires of Native Hawaiians. Another advantage of such a process is that it would not depend on the federal government enacting a statutory scheme designed to encourage the creation of a tribe; Native Hawaiians could simply organize themselves into a tribal grouping on their own. This, however, would put a huge burden on Native Hawaiians. They would have to create the tribal structure and convince all other Native Hawaiians to join them, without being able to offer any specific incentive for doing so.<sup>262</sup>

## 2. *Congressional Incentives Through Legislation Giving Benefits to a Native Hawaiian Tribe*

A different method of bringing Native Hawaiians within the special relationship would be for Congress to pass legislation that would give benefits directly to a Native Hawaiian tribal organization that met specified criteria (e.g., those from *Montoya v. United States*)<sup>263</sup> for status as a tribe.<sup>264</sup> The idea would be to create incentives for Native Hawaiians to organize themselves into a tribe through the inducement of federal largesse. Because the benefits would flow to an organization that, by definition, met the criteria for cohesiveness, this system would eliminate the difficulties associated with giving benefits to an inchoate grouping of Native Hawaiians.

---

262. The obvious incentive for the creation of a Native Hawaiian tribe is mitigating the danger that programs benefiting Native Hawaiians will be declared unconstitutional. This may not prove to be an adequate incentive, however; a Native Hawaiian would be joining only to avoid a possible danger, the contours of which may not be clear to the average Native Hawaiian, rather than to gain new benefits. The lack of affirmative incentives to join a Native Hawaiian tribe might be addressed in part by the promise of congressional action to give significant benefits to such a tribe once it was established. That is, organizers of a tribe might have an easier time persuading others to join if they could promise that, once established, the Native Hawaiian tribe would enjoy the full panoply of benefits available to American Indian tribes. This possibility undercuts one of the advantages identified above, however: Its success would depend on the passage of a legislative scheme to confer new benefits on Native Hawaiians (and on Native Hawaiians' belief in the promise of such congressional action), and thus would mitigate Native Hawaiians' sense of control over the process.

263. 180 U.S. 261, 266 (1901).

264. The State of Hawaii also could set up a system whereby it would recognize Native Hawaiian groups that met certain criteria. It seems unlikely, though, that the Supreme Court would treat such state recognition as creating a special relationship for constitutional purposes such that benefits for these tribes would be subject to rational basis review. In *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (1979), the Supreme Court stated that the special relationship does not include states. See *supra* note 217. In fact, in several cases the Court has stated that the federal government has exclusive authority to deal with Indian tribes. See *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832); see also *United States v. Mazurie*, 419 U.S. 544, 554 n.11 (1975) (noting "Congress' exclusive constitutional authority to deal with Indian tribes"); *Bryan v. Itasca County*, 426 U.S. 373, 376 n.2 (1976) (discussing "plenary and exclusive power of the Federal Government to deal with Indian tribes"). *Yakima Nation* noted the possibility of the federal government authorizing state actions with respect to tribes (including, perhaps, recognition), but that, of course, would require Congress's involvement. See 439 U.S. at 501.

This may seem like putting the cart before the horse, because congressional enactment of statutory benefits should follow, rather than precede, the creation of a tribe.<sup>265</sup> There is, however, a precedent for legislation that spurs the creation of the very organizations that will receive benefits as the equivalent of Indian tribes: the Alaska Native Claims Settlement Act of 1971 (ANCSA).<sup>266</sup> Traditional Alaska Native villages had been eligible for recognized status under the IRA since 1936 (two years after the IRA's passage), but ANCSA, in settling Alaska Native land claims, opened the way for new entities.<sup>267</sup> ANCSA provided for the creation of Alaska Native Regional Corporations and Alaska Native Village Corporations, none of which previously existed; ANCSA simply propounded the standards for the creation and organization of these corporations and provided that they would receive certain property.<sup>268</sup> Moreover, these Regional and Village Corporations have

---

265. It could be argued that such a statute would run afoul of *Adarand*, on the theory that, in attempting to foster the creation of a Native Hawaiian entity, the federal government would be singling out a class—Native Hawaiians—who were not (yet) in tribal organizations. It seems unlikely, however, that this would pose an insuperable hurdle. If the wording of the statute made clear that it had no effect upon Native Hawaiians, defined by ancestry, but instead merely provided for recognition of an Indian tribe (in this case, a Native Hawaiian tribe) that met certain qualifications, a court would probably treat the statute differently from those directed at Native Hawaiians, defined racially, with no suggestion of tribal affiliation; in fact, a court might treat the statute as an element of a resulting special relationship. That the statute would likely contain some racial classification (e.g., descentance from pre-1778 inhabitants) probably would not disqualify it from rational basis review, any more than the BIA hiring preference's effective limitation to those with Indian blood did in *Mancari*.

It also bears mentioning that this is where the history of the United States's actions vis-à-vis the Hawaiian government and the terminated tribe analogy, *see supra* Subsection III.D.2, might become relevant. The federal government could plausibly articulate a compelling interest in assisting the creation (or, more properly, the "re-creation") of a Native Hawaiian government, in light of its contribution to the death of the government that had once constituted an indigenous political structure presiding exclusively over Native Hawaiians; and providing for the re-creation of an indigenous political structure is arguably narrowly tailored to serve that compelling interest. Moreover, there have been cases—most notably, involving the Menominee Tribe—of federal government support for elections pursuant to which terminated tribes were rerecognized. *See* 25 U.S.C. §§ 903b–c (1994). The Menominee Tribe's situation was different, because it had retained some political organization after its relationship with the government was terminated (and the statute on its elections was never subject to an equal protection challenge). Still, this does constitute a historical example of federal involvement in the re-creation of a recognized tribe. As was noted above, though, the success of this argument is complicated by the fact that, by the time the United States Minister landed troops and helped to overthrow the government in 1893, it had become a multiethnic oligarchical polity. *See supra* text accompanying notes 49–55, 196–98.

266. 43 U.S.C. §§ 1601–29e (1994).

267. The original 1934 IRA included Eskimos and other Alaskan aboriginal groups among those who could create governmental organizations; the 1936 amendments to the IRA also permitted them to register as federally chartered entities. *See* Act of May 1, 1936, ch. 254, § 1, 49 Stat. 1250 (codified at 25 U.S.C. § 473a). Thus, as of 1936, the IRA provided that Indian groups (including Alaska Natives but not Native Hawaiians) that met certain statutory requirements could adopt constitutions for carrying out governmental activities and could incorporate by federal charter for business purposes. *See* Act of June 18, 1934, ch. 576, §§ 16–17, 48 Stat. 987–88 (codified as amended at 25 U.S.C. §§ 476–77). Many traditional Alaska Native villages responded by registering as federally chartered villages under the IRA. *See* Smith & Kancewick, *supra* note 152, at 493–94.

268. *See* 43 U.S.C. §§ 1606–07; Martha Hirschfield, Note, *The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form*, 101 YALE L.J. 1331, 1333–37 (1992); John F. Walsh, Note, *Settling the Alaska Native Claims Settlement Act*, 38 STAN. L. REV. 227, 248–53 (1985); *see also* Arthur Lazarus, Jr. & W. Richard West, Jr., *The Alaska Native Claims Settlement Act: A Flawed Victory*, in AMERICAN INDIANS AND THE LAW 132, 134–35 (Lawrence Rosen ed., 1976).

now been included in many of the statutory definitions of "Indian tribe" and as a result receive some of the same benefits that accrue to federally recognized tribes.<sup>269</sup> ANCSA does not require that the corporations meet the requirements delineated in *Montoya* (though it does mandate that the Secretary of Interior divide Alaska into regions, "with each region composed as far as practicable of Natives having a common heritage and sharing common interests"),<sup>270</sup> and the constitutional status of these corporations for purposes of equal protection analysis is not clear; ANCSA is nonetheless significant, because it represents a legislative effort to foster the creation of organizations that will be treated as "Indian tribes."<sup>271</sup>

#### B. *The Significance of the Noncontinuous Existence of a Native Hawaiian Tribe*

Assuming that Native Hawaiians do organize themselves into a tribal organization (whether at their own initiative or in response to legislative incentives), would that tribal organization be an "Indian Tribe[]" for constitutional purposes such that it would be subject to the special relationship? In other words, if Native Hawaiians took the steps outlined above, would the special relationship extend to them?

---

269. See, e.g., 25 U.S.C. § 450b(e) (self-determination); *id.* § 1603(d) (health care), *id.* § 1903(3) (child welfare); *id.* § 2026(14) (BIA programs); *id.* § 2403(3) (substance abuse programs), *id.* § 2511(2) (tribal schools); *id.* § 3501(1) (energy resources); *id.* § 3703(10) (agricultural resources), *id.* § 4001(2) (trust fund management); 26 U.S.C. § 45A(c)(6) (1994) (employment tax credits); 33 U.S.C. § 2701(15) (1994) (oil pollution compensation); 38 U.S.C. § 3115(c) (1994) (vocational rehabilitation); 42 U.S.C. § 628(c)(2) (1994) (child welfare services); *id.* § 3002(6) (older Americans programs).

270. 43 U.S.C. § 1606(a).

271. It may seem tempting to avoid the time and effort that these two methods entail by means of a third option: Congress (or perhaps even the Department of Interior) simply recognizing Native Hawaiians as a tribe, without having to rely on any elaborate legislative schemes or on any actions by Native Hawaiians.

Such recognition would bring Native Hawaiians closer to convincing a court that they were subject to the special relationship; the lack of recognition is one of the obstacles to Native Hawaiians' status as an Indian tribe, and this proposal would remove it. The problem, however, is that there are constitutional limits to congressional authority; the Supreme Court has stated that it will give some deference to a federal decision to recognize an Indian tribe but will make an independent judgment as to whether federal recognition was arbitrary or irrational. See *supra* notes 213–15 and accompanying text. It seems likely that federal recognition of Native Hawaiians as a whole would fail that test; as was noted above, all Native Hawaiians have not assented to the governance of a tribal organization. See *supra* notes 172–73 and accompanying text. Part of the problem for the Native Hawaiian community, in fact, is that many Native Hawaiians left their land during the nineteenth century and became ordinary laborers. Their real connection, as the definitions used in relevant statutes reveal, is that they share a common ancestry. See OFFICE OF HAWAIIAN AFFAIRS, *supra* note 54, at 9 (noting that Native Hawaiians "are highly differentiated in religion, education, occupation, politics, and even in their claims to Hawaiian identity" (quoting Kanahelo, *supra* note 171, at 21)); *id.* at 24 (describing Native Hawaiian population as, *inter alia*, "racially mixed, gender-balanced, urbanite, [and] unattached"). Any federal recognition of the entire community of Native Hawaiians would be similar to a federal recognition of all people of American Indian descent. It would eviscerate *Mancari*'s distinction between racial and political classifications; it would suggest that *Mancari*'s limitation can be circumvented simply by defining a tribe as being composed of all members, and only those members, of a racial group. It seems unlikely that a court would accept such a transparent effort to transform a racial classification into a tribal one.

At first glance, the answer seems easy. *Montoya* suggested a number of criteria ("a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory"),<sup>272</sup> and a Native Hawaiian tribe could be structured to satisfy all of them. Even if there are additional requirements regarding the structure and function of a tribe (e.g., that it hold meetings periodically),<sup>273</sup> these could be met simply by setting up the tribe accordingly. Some sources suggest, however, that there may be an additional requirement for status as a tribe that does not inhere in the current structure of a tribe and thus cannot be met so easily: that the tribe have a long and continuous existence as a functioning tribal organization. The BIA's regulations, as well as some lower court cases, indicate that this is an additional prerequisite for status as a tribe.<sup>274</sup>

If there is a requirement of continuous tribal organization, it would probably preclude the creation of a Native Hawaiian tribe for constitutional purposes; as was noted above, Native Hawaiians have not remained in a tribal entity.<sup>275</sup> There is some reason to doubt, however, that such a requirement exists. For one thing, it has not been established that a tribe must have any particular connection to a historical sovereign entity (much less continuous functioning from historical times until the present).<sup>276</sup> Although a number of

272. *Montoya v. United States*, 180 U.S. 261, 266 (1901).

273. Cf. 25 C.F.R. § 83.7(c)(1)(iii) (1996) (noting significance of widespread involvement in political processes by most of group's members).

274. See *id.* § 83.7(b) (requiring that "[a] predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present"); *id.* § 83.7(c) (requiring that "[t]he petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present"); see also, e.g., *United States v. Washington*, 641 F.2d 1368, 1372 (9th Cir. 1981) ("[T]he group must have maintained an organized tribal structure.").

As was noted above, the BIA's regulations determine whether the federal government will recognize a group, not whether the government has the constitutional authority to do so; accordingly, the BIA's inclusion of these requirements does not necessarily indicate that they are constitutionally mandated. See *supra* note 160 and accompanying text.

275. See *supra* text accompanying notes 172–73; see also text accompanying note 193.

276. If there is no requirement of historical continuity, then the structure and implementation of the HHCA contain a bitter irony for Native Hawaiians: Had the HHCA been drafted differently—specifically, in a manner that encouraged the formation of a Native Hawaiian tribe or tribes—the concerns raised in this Article might have been mitigated (if not avoided entirely). Congress could, for instance, have decided to foster the creation of a Native Hawaiian tribe by legislating that the lands at issue would be given outright to a tribal organization that met *Montoya's* criteria for status as a tribe. Native Hawaiians could then have created the tribe, and it could have served the role in their lives that tribes serve on reservations in the United States. Such an arrangement would have had the effect of creating a Native Hawaiian tribe, which the federal government could single out for legislation under the principles of *Mancari*. In fact, this bears a strong similarity to the manner in which ANCSA created Alaska Native Regional and Village Corporations (although their constitutional status is uncertain, in part because of the potential requirement of historical continuity). See *supra* notes 266–71 and accompanying text; *infra* note 278.

Alternatively, assuming that the drafters of the HHCA saw no reason to encourage the creation of a Native Hawaiian tribe, they still could have precluded the constitutional problems facing the HHCA by simply giving the government's land outright to Native Hawaiians; by now, the statute of limitations for a claim challenging the transfers would have long since run. This divestiture of land would not have placed other programs on sound constitutional footing, but it would have given Native Hawaiians a fair amount of land.

lower courts have suggested that a connection is required, the Supreme Court has not. Most notably, the definition contained in *Montoya v. United States* posited only contemporaneous requirements (e.g., "inhabiting a particular though sometimes ill-defined territory").<sup>277</sup> Also, nothing in the term "Indian Tribes" suggests that an unbroken history is necessary. As was noted above, the Indian Commerce Clause's use of the term "Indian Tribes" rather than "Indians" may suggest that something more than an agglomeration of Indians is necessary, that there must be a group coherent enough to be called a "Tribe[.]" The same cannot be said of a requirement that such an Indian group have a long history; the term "Indian Tribe[.]" is consistent with both a formulation that would include such a requirement and one that would not. It may be, therefore, that the Supreme Court would not impose a requirement of a historical connection to a longstanding tribe.<sup>278</sup>

---

The fact that the HHCA neither fostered the creation of a Native Hawaiian tribe nor gave the land to Native Hawaiians outright might seem to represent another way that the federal government is responsible for the absence of such a Native Hawaiian tribe. The problem with this line of argument is that the federal government was not obligated to enact the HHCA in the first place. Its action was purely discretionary. It would be difficult to convince the Supreme Court that the United States's actions, in not going far enough to assist Native Hawaiians' creation of a tribe, thereby deprived Native Hawaiians of tribal status. The real complaint, it seems, is not with the HHCA (which certainly did not prevent Native Hawaiians from creating tribes; it merely did not foster them), but with the original actions in deposing the government of Hawaii and eliminating its role entirely. And that, as has been discussed above, may be a source of shame for the United States, but it does not provide a basis for finding that the special relationship exists.

277. 180 U.S. 261, 266 (1901). The facts of *Montoya* appear to give some support to the proposition that a long history is not necessary, although the issue is not free from doubt. In *Montoya*, the question was whether a recently formed group of American Indians composed of members of several tribes (primarily the Chiricahua Apache Indians) was a "band, tribe or nation in amity with the United States" for purposes of a statute allowing for property claims against the United States. *Id.* at 264 (quoting Act of Mar. 3, 1891, ch. 538, 26 Stat. 851, 851-52). The Court found that the group in question

was, at and long before the occurrence complained of, "known and recognized as a band, separate and distinct in its organization and action from the several tribes, then at peace, to which its members had formerly belonged, and that the band as thus constituted was not in amity with the United States."

*Id.* at 269 (citation omitted). The Court found that the group constituted a "band" of Indians and stated that it had been a band "long before the occurrence complained of," *id.* at 269, even though the findings of fact indicated that the "band" came together in 1876 and took the property at issue in 1880, *see id.* at 261 n.2, 262 n.3. Admittedly, all of the members of this band had been members of full-fledged Indian tribes beforehand, so the new band represented a reconstitution of the existing tribes, rather than the creation of a new tribe with members that had never before been subject to the special relationship and whose only connection to a tribe was through their ancestors. It is not clear that their prior membership in a different tribe played any role in the Court's decision, however, and the fact remains that a new group coalesced in 1876 and, by 1880, was considered to be a band of Indians.

278. In this regard, it should be noted that some of the groups currently regarded as tribes are not the successors to previous tribes. In some cases the federal government consolidated several tribes into one newly created tribe, and in other cases it split a single tribe into several tribes. *See* COHEN, *supra* note 2, at 5-6. More importantly, the federal government on several occasions aggregated loose bands of American Indians into tribes, even though no previous tribal organization existed. *See* *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 664 n.5 (1979) ("[T]he territorial officials who negotiated the treaties [at issue] on behalf of the United States took the initiative in aggregating certain loose bands into designated tribes and even appointed many of the chiefs who signed the treaties."); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 192 (1978) (noting that United States established relations with tribe that was aggregation of loosely related villages); *see also* COHEN, *supra* note 2, at 6. This has also occurred more recently, as many statutory definitions of "Indian tribe" include not only

More important, if there is a requirement of a connection to a historical tribe, it is not clear that there is a further requirement of continuous functioning. The sources that have posited the criterion of a historical connection have differed on whether it requires merely that the current tribe be the successor to a historical tribe or that it also have an unbroken history of functioning as a tribe. In particular, the main circuit that deals with Native American law—the Ninth—has presented a shifting view on this issue. In a 1981 case, the court suggested that the tribal organization must have been maintained, though it found that such maintenance could be demonstrated “if some defining characteristic of the original tribe persists in an evolving tribal community.”<sup>279</sup> More recently, the court put forward a slightly broader formulation: “[A] relationship between the modern-day entity seeking tribal status and the Indian group of old must be established, but some connection beyond total assimilation is generally sufficient.”<sup>280</sup> Finally, in a 1992 case, the Ninth Circuit stated that the members of a new tribe must meet *Montoya*’s criteria and demonstrate “that they are ‘the modern-day successors’ to a historical sovereign entity that exercised at least the minimal functions of a governing body”; significantly, the court did not suggest any requirement of continuous functioning from historical times until the present.<sup>281</sup> Thus, assuming that there is a requirement of a connection to a historical sovereign entity, there is some judicial support for the suggestion that continuous functioning is not required.

This is significant, because, insofar as there is a requirement of a connection to a previously sovereign entity but not a requirement of continuous functioning, a newly created Native Hawaiian tribe would have a credible argument: The tribe could argue that it was the modern-day successor to the

---

Alaska Native villages (which, though often incorporated after 1936, generally had long been functioning as governing units) but also Alaska Native Regional Corporations and Village Corporations, all of which were created in response to ANCSA. See statutes cited *supra* note 269. On Alaska Native villages, see Smith & Kancewick, *supra* note 152, at 493, 496–98. Cf. Paul A. Matteoni, Comment, *Alaska Native Indian Villages: The Question of Sovereign Rights*, 28 SANTA CLARA L. REV. 875, 894 (1988) (asserting that “[h]istorical governmental powers had not been maintained before the creation of the[] modern village governments” under IRA). Finally, also relevant is 25 U.S.C. § 476(f) (1994), which prohibits distinctions between tribes that were created through combination or splitting and those that have a continued existence stretching back through the nineteenth century.

Admittedly, this history is of limited importance; it may merely indicate that the federal government has inappropriately treated as tribes some groups that cannot meet the constitutional minima for status as a tribe. See *supra* note 206. Moreover, even if these groups would not be vulnerable to challenge today because they have now existed for 60 years, that precedent would help Native Hawaiians only if their organizations could exist for 60 years before being challenged, and there is of course no guarantee of such a grace period.

279. *United States v. Washington*, 641 F.2d 1368, 1372–73 (9th Cir. 1981).

280. *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 557 (9th Cir. 1991).

281. *Native Village of Tyonek v. Puckett*, 957 F.2d 631, 635 (9th Cir. 1992) (quoting *Native Village of Venetie*, 944 F.2d at 559); see also *Pit River Home & Agric. Coop. Ass’n v. United States*, 30 F.3d 1088, 1096 (9th Cir. 1994) (stating that “group claiming tribal status must show they are ‘modern-day successors’ to a historical sovereign entity that exercised political and social authority”) (quoting *Native Village of Venetie*, 944 F.2d at 559).

Hawaiian polity in the late eighteenth century that was gradually subverted by outside forces. This argument may seem like a stretch, because the new tribe would exercise very little power. The same is true, however, of Indian tribes that once exercised complete dominion over large land areas and now have relatively modest authority over small reservations.<sup>282</sup> Moreover, the inevitable differences between the new tribe and its historical predecessor may be of limited significance. The cases have required a strong historical connection, but, as the Ninth Circuit stated, “[t]he correlation between the present-day group of Indians and any historical sovereign entity need not be perfect.”<sup>283</sup>

This point introduces, however, an important complicating factor. As was noted above, by 1893 the government of Hawaii was a multiethnic oligarchical polity. A new tribe limited to descendants of pre-1778 inhabitants that claimed to be the successor to the 1893 government would have a hard time establishing that its limitation to Native Hawaiians was consistent with the composition of the 1893 polity (or even that the 1893 government was an “Indian Tribe[.]” for constitutional purposes). The obvious solution would be for the new Native Hawaiian tribe to assert derivation from a Native Hawaiian polity that did not include Westerners, as this would help to justify the limitation to Native Hawaiians. The difficulty with this solution is that Westerners’ influence stretches far back in Hawaii. Western residents had been eligible for naturalization since 1840 and had been treated as ordinary subjects, for purposes of the application of Hawaii’s laws, since 1829.<sup>284</sup> In fact, there were permanent Western residents dating back to the late eighteenth century, chief among whom were advisers to Kamehameha who helped him to overcome the rulers of the other islands and unite them under his rule in 1810.<sup>285</sup> Assuming that Native Hawaiians want to create a tribe that includes only pre-1778 descendants, then, the appropriate date for purposes of the derivation of the new tribe appears to be 1778 (before Westerners arrived). If so, however, then Native Hawaiians would probably need to create several tribes, corresponding to the kingdoms that existed at the time (i.e., with

---

282. In addition, it is not clear that any significance attaches to the form of the relevant government. As the Ninth Circuit said in a case involving Alaska Native Villages:

To the extent that Alaska’s natives formed bodies politic to govern domestic relations, to punish wrongdoers, and otherwise to provide for the general welfare, we perceive no reason why they, too, should not be recognized as having been sovereign entities. If the native villages of Venetie and Fort Yukon are the modern-day successors to sovereign historical bands of natives, the villages are to be afforded the same rights and responsibilities as are sovereign bands of native Americans in the continental United States.

*Native Village of Venetie*, 944 F.2d at 558–59.

283. *Id.* at 559 n.13.

284. See 1 KUYKENDALL, *supra* note 45, at 129, 229–30; 1 STATUTE LAWS OF HIS MAJESTY KAMEHAMEHA III, ch. V, art. I, §§ 3, 10–14 (1846).

285. See 1 KUYKENDALL, *supra* note 45, at 25–51.

different rulers over different islands).<sup>286</sup> If, on the other hand, Native Hawaiians wanted to create a single tribe, they would probably need to define its membership as of 1810 at the earliest (which might mean the inclusion of some Westerners who are not descended from pre-1778 inhabitants).<sup>287</sup> In light of these complications, it is impossible to determine in advance whether a hypothetical Native Hawaiian tribe (or tribes) could demonstrate a sufficient relationship to a historical sovereign entity. It does seem possible, though, that a tribe (or tribes) could satisfy this criterion; and the more connections Native Hawaiians could demonstrate between a new tribe and its historical predecessor, the stronger the constitutional footing of the new tribe would be.

### C. *Limitations of Any Approach to the Creation of a Native Hawaiian Tribe*

The foregoing indicates that there are ways of creating a Native Hawaiian tribe (or tribes) that might meet the constitutional minima for status as an "Indian Tribe[]" under the Indian Commerce Clause and thus be subject to the special relationship. That would not, by itself, be sufficient to subject the current programs for Native Hawaiians to rational basis review, however. There would still be two significant obstacles to the application of rational basis review to the current programs, absent further legislative action.

First, the newly created special relationship between the federal government and a Native Hawaiian tribe (or tribes) likely would not alter the constitutional status of any program that still had an ancestry-based definition of "Native Hawaiian" (as all the programs currently do). Such definitions probably would continue to be analyzed as racial classifications. Federal (as well as state) action thus would be necessary in order to bring the statutory

---

286. Kuykendall identified four kingdoms as of 1778: one over the island of Hawaii and the Hana district of east Maui; a second over Maui (except the Hana district) and its three dependent islands; a third over Oahu; and a fourth over Kauai and Nihau. *See id.* at 30.

Of course, it is possible (perhaps probable) that multiple tribes would not break cleanly along geographical lines, and instead would simply be several coexisting groups (not unlike the current cluster of Native Hawaiian groups). If a series of tribes were organized on this basis, they would be hard pressed to claim derivation from the pre-1778 kingdoms; instead, they would probably have to claim derivation from the post-1810 Hawaiian monarchy. Under these circumstances, however, it would be harder for multiple tribes to meet any requirement of a historical connection than it would for one large tribe of all Native Hawaiians. If there were one tribe, that group could plausibly assert that it had assumed all the powers and functions of the former monarchy, except insofar as those powers and functions were now exercised by the United States and the state government. If there were several tribes the various groups would further divide their limited power and functions among themselves, and thus could not make this claim. These tribes would be forced to argue that, as a collectivity, they were the successors to the monarchy, and that their decision to split up into several tribes did not affect their successorship. It is not clear that such an argument could overcome the fact that the tribes would be attempting to fracture the Hawaiian kingdom into subparts that the kingdom never had.

287. Inclusion of some Westerners would not necessarily defeat a claim of tribal status, as the Court has never directly addressed the question whether the presence of a few Westerners in a tribe alters its status. *See supra* note 144. In this regard, it does bear mention that some Indian tribes included Westerners (who often were taken as captives, but sometimes stayed with the tribe as members). *See Axtell, supra* note 144.



schemes within the special relationship; the definitions of "Native Hawaiian" would probably need to center on tribal membership, rather than ancestry.<sup>288</sup>

Second, the extension of the federal government's special relationship with Indian tribes to Native Hawaiians would, in all probability, have little impact on most of the state programs that benefit Native Hawaiians. The one category that might be affected is state programs that have been authorized by the federal government.<sup>289</sup> Under *Adarand* and *Croson*, these programs currently would be subject to strict scrutiny; if the special relationship were extended to Native Hawaiians, federally authorized programs would, under *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*,<sup>290</sup> be subject to *Mancari's* rational basis review.<sup>291</sup> Extension of the special relationship to Native Hawaiians would likely have no bearing, however, on the constitutionality of state programs for Native Hawaiians that are not federally authorized. Such programs currently would be subject to strict scrutiny under *Croson*, and, assuming creation of a special relationship with Native Hawaiians, would still be subject to heightened (presumably strict) scrutiny in light of the inapplicability of *Yakima Nation*. There are two ways in which these programs could conceivably be affected by the extension of the special relationship at the federal level, but both of them are purely conjectural: It is possible that the Supreme Court will apply more lax standards of federal authorization in the special relationship context than in the affirmative action context;<sup>292</sup> and it is possible that the Supreme Court will utilize a form of

---

288. These statutory changes would be necessary because, as was discussed above, *see supra* notes 154–55 and accompanying text, the mere existence of a tribe would likely be insufficient if the statutory scheme did not depend on tribal membership. That, presumably, is why the Court did not suggest in *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995), *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), or *Fullilove v. Klutznick*, 448 U.S. 448 (1980), that the relevant program's inclusion of American Indians, defined racially, would be subject to a different level of scrutiny; though all the American Indian beneficiaries may have been members of tribes, the programs giving them benefits did not require tribal membership and were instead based on ethnicity.

It might be contended that because all Native Hawaiians would be members of the Native Hawaiian tribe (or tribes), the Native Hawaiian situation would be different and analogous to a statute simply referring to "the Navajo." *See supra* note 154. The analogy fails, however, because the obvious intent of the latter statute would be to benefit the members of the Navajo tribe (and otherwise, it would be constitutionally problematic); the statutes benefiting Native Hawaiians, however, were not enacted with reference to any tribe. Moreover, because it is overwhelmingly likely that some Native Hawaiians would not choose to join the Native Hawaiian tribe (or tribes), the current statutory definitions of "Native Hawaiian" would not be coextensive with the membership of the Native Hawaiian tribe (or tribes).

289. The obvious candidate is the HHCA, which was not merely federally authorized but was originally passed as federal legislation and imposed upon Hawaii as a condition of statehood. *See supra* note 64. The existence and scope of the federal authorization of the HHCA is not entirely free from doubt, however. *See supra* note 242.

290. 439 U.S. 463 (1979).

291. *See supra* note 217.

292. It is interesting to compare the level of authorization that courts, in pre-*Adarand* days, required for application of *Metro Broadcasting* (rather than *Croson*) to a program with the level of authorization they require for application of *Mancari's* analysis to state programs for Indian tribes.

Though *Croson* did not address the issue directly, some lower courts after *Croson* found that state or local programs were authorized by federal law (and thus reviewable under *Metro Broadcasting's* then-applicable intermediate scrutiny); but courts construed congressional authorization narrowly and clarified

heightened scrutiny less rigorous than strict scrutiny in considering the constitutionality of state actions that single out members of tribes.<sup>293</sup> Even if these speculative changes came to pass, however, their impact on a program like OHA is unclear, because OHA might not satisfy even broad standards of federal authorization and might be unconstitutional even if subjected to some form of heightened scrutiny less rigorous than strict scrutiny.

Both of these obstacles could be avoided, but only through significant legislative changes. Eliminating the problems created by the current definitions of "Native Hawaiian" would be simple enough: The federal government<sup>294</sup>

---

that state programs with substantive provisions that were not found in the federal statute would be subject to *Croson's* strict scrutiny. See, e.g., *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 424-25 (7th Cir. 1991); *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 57-58 (2d Cir. 1992); *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 975 (6th Cir. 1991); *Ellis v. Skinner*, 961 F.2d 912, 915-16 (10th Cir. 1992); see also *Croson*, 488 U.S. at 491 (plurality opinion) (intimating that Congress could authorize states and municipalities to institute programs with preferences that they could not enact on their own account).

With respect to the application of the special relationship to state laws, the main case is *Yakima Nation* itself, in which the Court found that a state legislated pursuant to the special relationship where the enactment at issue was explicitly authorized by a federal statute. Lower courts, though, in applying *Yakima Nation*, have gone beyond the four corners of the decision and have interpreted the requirement of federal authorization liberally; it is not clear that these courts would limit the authorization to cases in which the state statute's provisions were wholly within the authorizing federal scheme. See *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1218-19 (5th Cir. 1991) (concluding that federal law implicitly authorized state law, even though federal law did not explicitly authorize any state laws, because state law was promulgated after federal law and mirrored federal law); *Livingston v. Ewing*, 601 F.2d 1110 (10th Cir. 1979); *St. Paul Intertribal Hous. Bd. v. Reynolds*, 564 F. Supp. 1408 (D. Minn. 1983); *Krueth v. Independent Sch. Dist. No. 38*, 496 N.W.2d 829 (Minn. Ct. App. 1993). Determining the exact level of authorization that current case law requires for application of the special relationship to state programs, however, is complicated by the fact that these are the only four post-*Yakima* cases in which a court addressed the application of the special relationship to a state action, and, of the four, two misconstrue *Yakima Nation* and a third ignores it. See *St. Paul*, 564 F. Supp. at 1412 (relying in part on state statute benefiting members of Indian tribes because "[s]tate action for the benefit of Indians can also fall under the trust doctrine and therefore be protected from challenge under the equal protection clause or civil rights statutes," and failing to note any requirement of federal authorization); *Krueth*, 496 N.W.2d at 836-37 (simply stating that *Mancari's* special relationship also applied to state action and quoting statement immediately above from *St. Paul*); see also *Livingston*, 601 F.2d at 1114-15 (relying on provision of Civil Rights Act of 1964 that excluded preferences for Indians from scope of Act in rejecting equal protection challenge to local ordinance permitting only American Indians to sell goods in certain areas; failing to address question whether federal statute constituted authorization for state statute under terms of *Yakima Nation* (and, in fact, failing to cite *Yakima Nation*)).

293. In light of *Adarand* and *Croson*, we know that strict scrutiny applies to state (or, for that matter federal) laws containing racial classifications. The Court has never squarely stated, however, what level of scrutiny applies to state laws containing tribal classifications. *Yakima Nation* indicates that it would be heightened scrutiny of some sort, see *supra* note 217, and the logic of *Yakima Nation* and *Croson* suggests that strict scrutiny would be the applicable form of heightened scrutiny: If states have no special relationship with Indian tribes, then state legislation for Indian tribes is presumably analogous to state legislation for any other group composed entirely of members of one ethnicity; moreover, there is no particular reason to assume that the Supreme Court would apply intermediate scrutiny to a state classification of tribes. Nonetheless, the level of scrutiny for state classifications of tribal Indians is not settled, and there is some possibility that the Court would fashion a level of review less rigorous than strict scrutiny. Accordingly, the transformation of Native Hawaiians' federal status from that of a racial group to that of an Indian tribe could conceivably affect the level of scrutiny for state enactments benefiting members of the Native Hawaiian tribe (or tribes).

294. Congress could enact such a change, or perhaps, in light of *Mancari's* reliance on a BIA regulation, the BIA could make the change on its own, even absent legislation so providing. Cf. *supra* note 38.

and Hawaii could simply change all the definitions to "members of the Native Hawaiian tribe [or tribes]." In order to remove the danger of heightened scrutiny for unauthorized state programs, however, the federal government would have to decide to authorize the numerous state programs for Native Hawaiians—a significant step toward benefiting Native Hawaiians that the federal government might not be willing to take.

Even if Native Hawaiians did create a tribe (or tribes) and all the legislation singling out Native Hawaiians was modified accordingly, however, the resulting programs almost assuredly would not apply as widely as they do now. Although the goal would be to create a Native Hawaiian tribe that would include all Native Hawaiians, it seems likely that some Native Hawaiians would not affiliate themselves with this tribal entity, thereby rendering themselves ineligible for the relevant benefits. While this may seem to be an argument against creating tribes, in fact it is a function of the Supreme Court's delineation of the special relationship. It also, however, underscores the likelihood that placing programs for Native Hawaiians on sound constitutional footing will entail the removal of benefits from some individuals who are currently entitled to them.

## VI. CONCLUSION

This Article has focused on the constitutional status of programs for Native Hawaiians, but its conclusions apply to all government programs that single out native groups: Unless those programs are limited to Native Americans who are members of entities that can constitute "Indian Tribes" in the constitutional sense, they will be subject to strict scrutiny, rather than rational basis review. *Mancari* and its progeny apply rational basis review only to programs for members of Indian tribes, and the substitution of some other political classification for tribal status likely will not suffice. Tribal status appears to be a *sine qua non*. Moreover, strict scrutiny will apply even where the federal government has mistreated the relevant native group, and even where the reason that no tribe exists is that the government helped to extinguish it. Finally, a history of statutes singling out the relevant group also will not create a special relationship.

The effect of strict scrutiny on existing programs for Native Americans may be dramatic: It is not clear that any such programs will meet the Supreme Court's requirements for demonstrating a compelling interest and narrow tailoring. The obvious solution is for native groups to create tribal structures, but this would work only if there is no requirement that a tribe have had a continuous existence. Even then, the programs for native groups, defined racially, would probably have to be reformulated so that they applied only to tribal members (and federal authorization would be necessary for state programs, even after they were reformulated).

The foregoing underscores the stark dichotomy that exists in the post-*Adarand* world: All programs containing racial classifications are presumptively invalid, except for the programs that apply to "Indian Tribes" under the Indian Commerce Clause; the latter programs are consistently upheld, regardless of whether they benefit or harm tribal members. The forbidding environment for racial classifications has no impact on the legal status of programs for Indian tribes. This has significant implications for native groups, as they may attempt to expand the existing universe of Indian tribes to include them and thereby ensure that programs benefiting them are upheld. The ramifications are also important for individual Native Americans: As long as the programs singling out members of the new Indian tribe confer benefits (as is the case with most of the current programs treating Native Hawaiians specially), there will be a great incentive for individual Native Americans to join them. *Adarand*, then, will have the presumably unintended effect of encouraging tribalism.

At bottom, a native group's constitutional status will depend on whether or not it is an "Indian Tribe[]." The need to create a tribe may seem unfair to Native Hawaiians and other Native Americans who are not organized into tribes; they may believe that their status should not be any different from that of members of Indian tribes. On the other hand, Native Americans' ability to create a tribe and thereby avoid strict scrutiny for their programs may seem unfair to other ethnic groups, like African Americans; no matter what entity, tribal or otherwise, such ethnic groups create for themselves, strict scrutiny will apply. Both sets of concerns go to the heart of the special relationship, as they raise doubts about the granting of preferences based on (voluntary) membership in an organization, as opposed to (involuntary) membership in a racial or ethnic group. It is not clear that it makes any sense for so much to depend on a person's membership in a tribe; but unless the Court rejects *Adarand* or *Mancari*, that sharp dichotomy, and its serious consequences, will remain.